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Carolyn P. Blum

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The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980

CAROLYN P. BLUM*

Since the passage of the Refugee Act of 1980, the United States Court of Appeals for the Ninth Circuit has played a crucial role in interpreting and clarifying the Act's asylum and withholding of deportation provisions. The Article reviews Ninth Circuit decisions on standard of proof, method of proof, and the five statutory bases which underlie any claim to asylum or withholding of deportation: race, religion, nationality, membership in a particular social group, and political opinion. The author also analyzes the court's interpretation of the term "persecution" under the asylum and withholding of deportation provisions. Finally, the author poses issues for future resolution.

INTRODUCTION

The Refugee Act of 1980¹ is the cornerstone of United States law

* Lecturer, Boalt Hall School of Law, University of California, Berkeley; Co-Director, Central American Refugee Defense Fund. B.A. 1971, University of Arizona; J.D. 1976, Northeastern University. The author wishes to thank Ignatius Bau, Laura Ramirez, and Barbara Sloan for their invaluable research assistance, and Matthew Ross, Ken Alex, and Deborah Anker for their thoughtful comments. Support for the research for this Article was provided by the Ford Foundation.

1. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) [hereinafter cited as 1980 Act or Refugee Act], codified at Immigration and Naturalization Act §§ 101(a)(42), 207-209, 243(h), 411-414, 8 U.S.C. §§ 1101(a)(42), 1157-1159, 1253(h), 1521-1524 (1982) [hereinafter cited as INA].

regarding the protection of persons fleeing persecution.² The Refugee Act includes provisions for the admission³ and resettlement⁴ of refugees into the United States, the granting of temporary asylum,⁵ and thereafter permanent residence to asylum-seekers⁶ at or within the borders of the United States, and the withholding or prohibition against deportation of persons whose lives or freedom would be threatened if they were ordered to leave the United States.⁷ These provisions, in part, are grounded in legal principles articulated in United Nations treaties concerning refugees.⁸

Since the Refugee Act's passage, the circuit courts of appeals have played a crucial role in interpreting and clarifying key provisions of the complex statutory and regulatory refugee and asylum law scheme.⁹ In particular, the United States Court of Appeals for the Ninth Circuit, confronted with a large volume of cases arising under

2. See, e.g., Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J. L. REF. 243 (1984); Note, *The Endless Debate: Refugee Law and Policy and the 1980 Act*, 32 CLEV. ST. L. REV. 118 (1983); Comment, *Political Asylum and Withholding of Deportation: Defining the Appropriate Standard of Proof Under the Refugee Act of 1980*, 21 SAN DIEGO L. REV. 171 (1983); Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

3. INA § 207, 8 U.S.C. § 1157 (1982). INA § 207(a)(3) mandates the admission on an annual basis of "refugees of special humanitarian concern" to the United States. *Id.* § 207(a)(3), 8 U.S.C. § 1157(a)(3). The term "refugee" is defined at INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). See *infra* text accompanying note 15. An alien admitted to the United States pursuant to § 207 is called a "refugee."

4. INA §§ 404-414, 8 U.S.C. §§ 1101, 1521-1524 (1982).

5. *Id.* § 208, 8 U.S.C. § 1158. The Attorney General is required to establish procedures for aliens in the United States or at ports of entry to apply for asylum. The first part of this procedure is the eligibility determination: whether the applicant is a refugee according to the definition at INA § 101(a)(42), 8 U.S.C. § 1101(a)(42). See *infra* text accompanying note 15. An alien who applies for and receives protection under these procedures is called an "asylee."

6. INA § 209(b), 8 U.S.C. § 1159(b) (1982).

7. *Id.* § 243(h), 8 U.S.C. § 1253(h). This section requires the Attorney General to withhold deportation of any alien to any country where the alien's life or freedom would be threatened on account of five statutorily-determined factors. These factors are the same for asylum under § 208 and withholding of deportation. See *infra* text accompanying notes 26-27.

8. United States Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, done Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Protocol]. The United States ratified the Protocol on October 4, 1968. 114 CONG. REC. 29, 607 (1968). See *infra* notes 15 & 27. See generally Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357 (1982); Note, *Alien's Rights: The Refugee Act of 1980 as Response to the 1967 Protocol Relating to the Status of Refugees: The First Test*, 14 VAND. J. TRANSNAT'L L. 561 (1981); Goldman & Martin, *International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law*, 5 HUM. RTS. Q. 302 (1983); Anker & Posner, *supra* note 2, at 60.

9. See, e.g., *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Marroquin-Manriquez v. INS*, 699 F.2d 129 (3d Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

the Refugee Act,¹⁰ has responded with a series of twenty-six published and over fifty unpublished decisions¹¹ in the five years since the 1980 Act was passed.¹² This body of cases directly addresses several major issues central to interpretation of the scope of legal protections for asylum-seekers in the United States.

This Article focuses on Ninth Circuit decisions concerning the substantive interpretation of the Refugee Act's asylum and withholding of deportation provisions, the two most crucial statutory sections for aliens seeking protection from persecution within the United States.¹³ After a brief overview of the relevant Refugee Act provisions in the next section, the Article then surveys Ninth Circuit deci-

10. The Ninth Circuit's large number of immigration cases, in general, and asylum cases, in particular, predominantly emanates from two factors: demographics and the presence of a major Immigration and Naturalization Service (INS) detention center in El Centro, California. The Ninth Circuit encompasses the western states of California, Arizona, Nevada, Oregon, Washington, Idaho, and Montana. California is believed to have the largest undocumented alien population of any state in the United States. See Cortes, California's Shadow Population: The Impact of Undocumented Immigrants from Latin American on State Health and Social Service Policies and Programs, A Working Paper for the California Policy Seminar, Institute for Government Studies, University of California, Berkeley (Aug. 1985) (citing United States Census Bureau figures).

In particular, 350,000-400,000 Central Americans, many of whom may seek asylum in the United States, are believed to live in California. Most of the potential asylum-seekers from Central America have arrived in the United States since conflicts in the region increased in 1979-1980. See San Francisco Chronicle, Nov. 28, 1985, at 1, col. 1; *Id.* Dec. 24, 1985, at 1, col. 1.

Central Americans are the petitioners in almost two-thirds of the reported cases in the Ninth Circuit in the past five years and almost ninety percent of the unreported cases in 1985 alone. Many of these cases originated when the applicant was detained at the INS facility in El Centro, where immigration judges conduct hearings for incarcerated detainees. These cases are given priority by the Board of Immigration Appeals for administrative review. Telephone interview with secretary to David Holmes, Chief Attorney Examiner, Board of Immigration Appeals (Mar. 14, 1986).

11. The memorandum decisions of the Ninth Circuit are deemed inappropriate for publication and may not be cited to or relied upon by the courts of the circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. 9TH CIR. R. 21(c). Nonetheless, this large body of decisions is an important source of information for assessing the court's concerns—procedural, factual, and legal—regarding asylum and withholding of deportation determinations. The unpublished cases often exemplify commonly found fact patterns and repetitive legal issues. The holdings of the unpublished cases also provide insight into the difference in outcome that may result from variations in presentation of evidence in the underlying case.

12. The Ninth Circuit's disproportionately large caseload of Refugee Act cases is reflected in the fact that the Ninth Circuit alone is responsible for over 40% of all published decisions of the circuit courts on issues of interpretation of Refugee Act provisions as of the writing of this Article.

13. Consideration of decisions focused on procedural or due process questions are beyond the scope of this Article. See, e.g., *Duran v. INS*, 756 F.2d 1338 (9th Cir. 1985); *Ramirez-Gonzalez v. INS*, 695 F.2d 1208 (9th Cir. 1983); *Medina v. Castillo*, 627 F.2d 972 (9th Cir. 1980).

sions analyzing the standard of proof that governs the asylum and withholding of deportation provisions. Next, the Article reviews Ninth Circuit interpretation of other key terms in the statutory language, in particular the meaning of the term "persecution" and judicial construction of the statutory bases of race, religion, nationality, membership in a particular social group, and political opinion that underlie any claim to asylum or withholding of deportation protection. The following section of the Article considers the implications of the court's rulings for the preparation and documentation of future cases. The Article surveys the Ninth Circuit's view of significant issues of proof such as the relevance of non-testimonial evidence, including general documentary evidence, and the Department of State's advisory opinion letters. The Article analyzes Ninth Circuit decisions regarding the applicant's testimony, focusing especially on the court's view of the requirements for corroboration of the applicant's statement and determinations of the applicant's credibility. A summary of the decisions discussed in these sections is provided at the end of each subsection. The Article concludes with discussion of a few of the areas in which resolution by the circuit court in the future can be anticipated.

STATUTORY FRAMEWORK

Asylum

The Refugee Act of 1980 is the first United States immigration statute to explicitly create the right of an alien in the United States to apply for asylum.¹⁴ The statute requires the Attorney General to establish procedures for determining asylum status, specifying that the primary criterion is whether the alien-applicant is a "refugee" within the meaning of section 101(a)(42)(A) of the Immigration and Nationality Act (INA).

The statute defines a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵

14. Prior to the Refugee Act, asylum was provided only by regulation. 8 C.F.R. § 108 (1975), *revoked*, 46 Fed. Reg. 45,117 (1981).

15. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (1982). Congress explicitly conformed the definition of a refugee in the Refugee Act of 1980 to that found in Article I of the Protocol. *See* Protocol, *supra* note 8, at 6225. S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979); H.R. REP. NO. 608, 96th Cong., 1st Sess. 9, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 141. Another subsection defining a refugee who is still within his or her country of origin is not germane to this discussion. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (1982).

After determining the asylum-seeker's eligibility as a statutorily-defined "refugee," the Attorney General or his designee can grant or deny asylum as a matter of discretion.¹⁶

The regulations implementing section 208 of the INA specify three procedures for asylum applications. An asylum-seeker may apply for protection with an Immigration and Naturalization Service (INS) District Director if he or she is in the United States or at a land border or port of entry, and if exclusion and deportation proceedings have not yet commenced.¹⁷ If the first approach is unsuccessful, the asylum-seeker may resubmit his or her application for asylum to an immigration judge in subsequent exclusion or deportation proceedings.¹⁸ Finally, even after exclusion or deportation proceedings have been initiated, an asylum request can be submitted for the first time to the immigration judge.¹⁹

The immigration judge's decision on all matters subsumed within the deportation hearing, including the asylum request, is subject to administrative review by the Board of Immigration Appeals (BIA or Board)²⁰ and judicial review in the circuit courts of appeals.²¹ Exclusion proceedings are subject to administrative review by the BIA and judicial review through habeas corpus petition to the federal district court.²² If an application for asylum is successful under any of the procedures described above, the alien (termed an "asylee") is eligible, after one year elapses, for permanent residence in the United States.²³

16. See, e.g., *In re Salim*, 18 I. & N. Dec. 311 (BIA 1982); Helton, *The Role of Discretion in Political Asylum*, 22 SAN DIEGO L. REV. 999 (1985).

17. 8 C.F.R. §§ 208.1, 208.3(a)(1985). See generally INA §§ 236, 242, 8 U.S.C. §§ 1226, 1252 (1982). Exclusion proceedings are instituted against aliens seeking entry and admission into the United States. Deportation proceedings are initiated against aliens already in the United States to determine if they should be expelled from the United States.

18. 8 C.F.R. §§ 208.1, 208.3(b), 208.9 (1985).

19. *Id.* §§ 208.1, 208.3(b), 208.10.

20. *Id.* § 3.1(b).

21. INA § 106(a), 8 U.S.C. § 1105(a) (1982). See generally *Foti v. INS*, 375 U.S. 217 (1963).

22. INA § 106(b), 8 U.S.C. § 1105(b) (1982).

23. *Id.* § 209(h), 8 U.S.C. § 1159(b). A grant of asylum may be terminated prior to the obtaining of permanent residence if a "change in circumstances in the alien's country of nationality" warrants a finding that he is no longer a refugee within the statutory meaning. *Id.* § 208(b), 8 U.S.C. § 1158(b); 8 C.F.R. § 208.15 (1985).

Withholding of Deportation

Since 1952, the Immigration and Naturalization Act has allowed the discretionary withholding of deportation of an alien who would be subject to persecution if returned to his or her homeland.²⁴ In the Refugee Act of 1980 this provision was revised as follows:

The Attorney General shall not deport or return any alien (other than an alien described in section 241(a)(19))²⁵ to a country, if the Attorney General determines that such alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group or political opinion.²⁶

The revision transformed section 243(h) into a *mandatory* remedy, removing discretion from the Attorney General or his designee.²⁷ If the criterion is met,²⁸ the alien *cannot* be deported to the country where persecution is more likely than not to occur except in limited situations. An exception is made for persons who pose a threat to national security, have committed serious crimes, or have persecuted others.²⁹

An application for withholding of deportation can only be made in an exclusion or deportation hearing.³⁰ The same form, the I-589, is used to apply for asylum and for withholding of deportation.³¹ A decision on a withholding application is subject to review—both administrative and judicial—pursuant to the same statutory provisions as the decision on the deportation and exclusion hearing.³² The

24. The 1952 Act required the alien to be subject to "physical persecution." INA of 1952 § 243(h), 66 Stat. 163, 214 (1952). In 1965, this phrase was replaced with "by persecution on account of race, religion or political opinion." Pub. L. No. 89-236, § 11, 79 Stat. 911, 918 (1965).

25. INA § 241(a)(19), 8 U.S.C. § 1251(a)(19) (1982). The exception refers to aliens deportable because of their participation with the Nazis in the persecution of others from 1933-1945.

26. *Id.* § 243(h), 8 U.S.C. § 1253(h).

27. The 1980 revision was intended to bring the United States statutory language into conformity with Article 33 of the 1951 United Nations Convention on the Status of Refugees which prohibits the expulsion or return (*non-refoulement*) of "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion." See H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 161. The United States is bound by the Convention since the Protocol incorporated Convention Articles 2 through 34. Protocol, *supra* note 8, at 6260. Note that Article 33 refers to a prohibition against return of a *refugee* to the country where his life or freedom would be threatened whereas § 243(h) refers to an *alien* needing the same protection.

28. *I.e.*, an alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

29. INA § 243(h)(2)(A-D), 8 U.S.C. § 1253(h)(A-D) (1982).

30. 8 C.F.R. § 242.17(c) (1985).

31. *Id.* § 208.3(b).

32. See *supra* notes 20-21. See generally *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968); *Foti v. INS*, 375 U.S. 217 (1963); *Londono-Gomez v. INS*, 699 F.2d 475 (9th Cir. 1984).

Ninth Circuit has emphasized the mandatory nature of this important protection remedy and has stated that "[t]he form of relief mandated by the amended section 243(h) is better described as a prohibition against deportation."³³

DECISIONS OF THE NINTH CIRCUIT

Introduction

Judicial construction of each component of the asylum and withholding of deportation provisions helps to define the scope and breadth of these remedies. Applications for the benefits of both statutory sections make reference to similar or identical factors. For both asylum and withholding of deportation protection, an applicant must prove,³⁴ by the applicable standard, that he or she fears persecution, or that his or her life or freedom would be threatened if returned to his or her home country.³⁵ He or she must demonstrate that the persecution or the threat results from one of five statutory bases: race, religion, nationality, membership in a particular social group, or political opinion. Only an application premised on one of these five bases will be accepted as within the statutory mandate of either asylum or withholding of deportation.

The standard of proof governing asylum and withholding of deportation is the key factor in the success of the applicant in proving his claim for protection. How much and what kind of evidence the applicant is required to provide, and what criteria the trier of fact and the reviewing court should use in evaluating that evidence, are the central questions posed by the standard of proof issue. In addition, the courts have examined whether asylum and withholding of deporta-

33. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 (9th Cir. 1985); *accord Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Maroufi v. INS*, 772 F.2d 597, 598 n.1 (9th Cir. 1985).

34. The burden of proof is on the applicant under both asylum and withholding of deportation provisions. *See* 8 C.F.R. §§ 208.5, 242.17(c) (1985).

35. Asylum provisions also make reference to the alien who has no nationality and who is unwilling to return to his country of last habitual residence. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1982); 8 C.F.R. § 208.13 (1985). In addition, since an asylum application can be denied because an alien has been "firmly resettled" in another country, the issue of the applicant's ability to live without risk in that country may also be at issue in the course of review of his application. *See* 8 C.F.R. §§ 208.8(f)(1)(ii), 208.8(f)(2), 208.14 (1985). Withholding of deportation provisions prohibit deportation to a country where the alien-applicant's life or freedom would be threatened. INA § 243(h), 8 U.S.C. § 1253(h) (1982). As a practical matter, however, asylum and withholding of deportation cases predominantly concern the need to prevent return to the alien's homeland.

tion applications are governed by the same standard and if not, what the significant difference is between the two standards. These questions regarding proof are not mere semantic problems. The court's explicit statements regarding proof are important signposts for the administrative agency in its day-to-day review of thousands of asylum and withholding of deportation cases.

In this section, the Article will examine the jurisprudence of the Ninth Circuit regarding each of the three major elements that constitute the substance of the statutory remedies of asylum and withholding of deportation: the standard of proof that governs each remedy, the meaning of persecution (and, to the extent it differs, the concept of threat to life or freedom), and the five statutorily-defined bases of protection.

Standard of Proof

Before 1980, the courts and the BIA described in a variety of ways the standard of proof required to substantiate a withholding of deportation request under section 243(h).³⁶ Both most commonly formulated a standard articulated as "the clear probability of persecution" test.³⁷ The 1980 Act, however, amended section 243(h) and created a statutory asylum procedure based on eligibility as a refugee, that is, one who has a "well-founded fear of persecution."³⁸ As a result, the crucial questions became: (1) Would the clear probability standard continue to apply to withholding of deportation requests? (2) Would the clear probability test also apply to asylum requests? (3) Did the use of the "well-founded fear of persecution" standard in the refugee definition signal a change to a less burdensome standard of proof for asylum and withholding of deportation?³⁹

The BIA maintained that the statutory revisions of the 1980 Act did not change the standard of proof governing withholding of deportation requests.⁴⁰ Indeed, the BIA held that the same standard, clear probability of persecution, applied to both section 243(h) withholding of deportation requests and considerations for asylum protection

36. See, e.g., *INS v. Stevic*, 104 S. Ct. 2489, 2495 n.12 (1984); *Martineau v. INS*, 556 F.2d 306, 307 & n.2 (5th Cir. 1977) ("clear probability of persecution" and "likelihood of persecution"); *Kovac v. INS*, 407 F.2d 102, 105, 107 (9th Cir. 1969) ("probability of persecution" and "likelihood").

37. See, e.g., *In re Dunar*, 14 I. & N. Dec. 310, 318-19 (BIA 1973) (accession to the Protocol did not change the applicability of the "clear probability of persecution" standard to § 243(h) determinations).

38. See *supra* text accompanying notes 14-33.

39. See *supra* text accompanying note 15. See also *infra* text accompanying notes 40-57.

40. See, e.g., *In re Lam*, 18 I. & N. Dec. 15, 17 n.3 (BIA 1981); *In re McMullen*, 17 I. & N. Dec. 542, 544 (BIA 1980), *rev'd on other grounds*, 658 F.2d 1312, 1317 (9th Cir. 1981) ("an applicant for . . . § 243(h) . . . must show that . . . he would be subject to persecution . . .").

under the newly-enacted section 208 provisions.⁴¹

Prior to 1984, the Ninth Circuit decisions did not clearly indicate the court's position on the standard of proof issue.⁴² For example, in *McMullen v. INS*,⁴³ the court applied "a likelihood of persecution" standard without any elaboration or explicit reference to the "clear probability" test.⁴⁴

Conflict on the standard of proof issue eventually erupted between the Second and Third Circuits.⁴⁵ The Second Circuit, in *Stevic v. Sava*, took the position that "with the passage of the 1980 Act, the 'clear probability' test is no longer the applicable guide for administrative practice under section 243(h) . . . [since the] 1980 Act thoroughly undercuts the reasoning of *Dunar*"⁴⁶ Although the court declined to articulate with precision the content of the standard required under the Refugee Act, it stated "[b]oth the text and the history of [the Refugee Act] strongly suggest that asylum may be granted, and, under section 243(h), deportation must be withheld, upon a showing far short of 'clear probability' that an individual will be singled out for persecution."⁴⁷

The Third Circuit unequivocally rejected this view in *Rejaie v. INS*.⁴⁸ The *Rejaie* court ruled that the Second Circuit's *Stevic* decision was erroneous because "[i]t attributed a stringency to the phrase 'clear probability' that was not consistent with [other cases]. . . ."⁴⁹ The court added that the Second Circuit "failed to appreciate case law consensus that the [clear probability and well-

41. *In re Martinez-Romero*, 18 I. & N. Dec. 75, 78 (BIA 1982), *aff'd*, 692 F.2d 595 (9th Cir. 1984); *accord In re Portales*, 18 I. & N. Dec. 239, 241 (BIA 1982) ("to meet [h]is burden of proof [under § 208], an alien must demonstrate a clear probability that he will be persecuted").

42. *See, e.g., Zavala-Bonilla v. INS*, 730 F.2d 562, 565 n.4 (9th Cir. 1984) (court rejects proposition that "continuing and contemporaneous cognizance" is required to prove likelihood of persecution but does not discuss "clear probability" standard); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (court uses "likelihood that he would be persecuted" and "he would be a target of government persecution" tests without reference to debate regarding "well-founded fear" or "clear probability").

43. 658 F.2d 1312 (9th Cir. 1981).

44. *Id.* at 1315. The court did find that the standard of review for withholding of deportation cases was changed by the Refugee Act revisions. A decision regarding the *mandatory* withholding of deportation can no longer be reviewed under an abuse of discretion standard, but must be reviewed under the more stringent substantial evidence test. *Id.* at 1316-17.

45. *Compare Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1981) *with Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982).

46. *Stevic*, 678 F.2d at 409.

47. *Id.*; *accord Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982).

48. 691 F.2d 139 (3d Cir. 1982).

49. *Id.* at 146.

founded fear] standards were equivalent . . . and [it] misapprehended the legislative history of the 1968 accession to the Protocol and the Refugee Act of 1980.”⁵⁰ The court ruled that “well-founded fear” is equivalent to “clear probability” and should be used as the standard for determining section 243(h) claims.⁵¹

On appeal from the Second Circuit, in *INS v. Stevic*,⁵² the United States Supreme Court issued its first ruling on Refugee Act issues. The Court rejected the approaches of both the Second and Third Circuits. The Court ruled that asylum and withholding of deportation are distinct remedies, and thus are not governed by standards of proof that make reference to each other.⁵³

Since *Stevic* sought review only of the denial of a motion to reopen to apply for section 243(h) relief, the Court ruled that it was not confronted with the question of the proper standard of proof for asylum.⁵⁴ As to the section 243(h) determination, the Court held that the “clear probability” standard should continue to apply.⁵⁵ The Court was unconvinced that either accession to the Protocol in 1968 or the passage of the Refugee Act effected any fundamental change regarding the section 243(h) standard of proof.⁵⁶ The Court endorsed a test for section 243(h) eligibility requiring proof that the applicant “more likely than not” would be subject to persecution on one of the specified grounds, a standard the justices viewed as “a familiar one to immigration authorities and reviewing courts.”⁵⁷

Since the *Stevic* decision, the Ninth Circuit has rendered a series of opinions which chart its position on the standard of proof issues.⁵⁸

50. *Id.*

51. *Id.* Even after the conflict emerged, the Ninth Circuit declined to enter the debate. *See, e.g., Shoaee v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983) (“we do not need to reach the standard for the asylum issue, however, because we hold the Shoaee’s claim would fail even under the test articulated by the *Stevic* court”).

52. 104 S. Ct. 2489 (1984).

53. *Id.* at 2498, 2500.

54. *Id.* at 2501. The only guidance provided by the Court regarding its view of the well-founded fear standard is the following dictum: “For purposes of our analysis, we may assume, as the Court of Appeals concluded, that the well-founded fear standard is more generous than the clear probability of persecution standard” *Id.* at 2498.

55. *Id.* at 2501.

56. *Id.* at 2500 & n.22. *But see supra* note 27.

57. 104 S. Ct. at 2498, 2501. The Court noted that the term “clear probability” was used interchangeably with “likelihood of persecution” and that the use of the word “clear” appears to have been surplusage. *Id.* at 2498 n.19.

58. *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985); *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Chatila v. INS*, 770 F.2d 786 (9th Cir. 1985); *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3561 (U.S. Feb. 25, 1986) (No. 85-782); *Sarvia-Quintanilla v. INS*, 767 F.2d 1387 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984), *as amended*, 767 F.2d 1277 (9th Cir. 1985); *Sagermark v. INS*, 767 F.2d 645 (9th Cir. 1985); *Argueta v. INS*, 759 F.2d 1395 (9th Cir. 1985).

Read together, these decisions require the application of the more lenient "well-founded fear" of persecution standard to adjudication of asylum applications and the more burdensome "clear probability" standard to withholding of deportation requests.⁵⁹ The cases provide elaborate description of what is actually meant by each of these terms.

In *Bolanos-Hernandez v. INS*,⁶⁰ the court first reviewed the statutory provisions relevant to asylum and withholding of deportation in light of *Stevic*, and addressed the Supreme Court's reference to the well-founded fear standard for asylum cases.⁶¹ In an opinion by Judge Reinhardt, the court stated that "the well-founded fear standard is in fact more generous than the clear probability test. The difference in language . . . strongly supports the conclusion that the standard of [section 208] is more liberal."⁶²

The court attempted to define the term "well-founded fear" by reference to other sources of law⁶³ and in contrast to the "clear probability" requirement.⁶⁴ It concluded that "an alien entitled to relief under section 243(h) will have established the clear probability

59. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), cert. granted, 54 U.S.L.W. 3561 (U.S. Feb. 25, 1986) (No. 85-782). The other circuits have widely varied views on this issue. The Third Circuit continues to maintain its view that the two standards are identical. *Sankar v. INS*, 757 F.2d 532, 533 (3d Cir. 1985); *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir. 1984). The Sixth Circuit has stated that well-founded fear requires a lesser showing than clear probability. *Youkhanna v. INS*, 749 F.2d 360, 362 (6th Cir. 1984). However, it has also stated that asylum requests made or renewed in deportation or exclusion proceedings should be judged under the clear probability standard. *Dally v. INS*, 744 F.2d 1191, 1196 n.6 (6th Cir. 1984). The Fifth Circuit has described the well-founded fear standard as "possibly more lenient" but required a showing that the applicant "will be persecuted . . ." to receive reopening (i.e., a new hearing for § 243(h) or § 208 relief). *Quan-Young v. INS*, 759 F.2d 450, 456 (5th Cir. 1985), cert. denied, 106 S. Ct. 412 (1985). The Seventh and Eleventh Circuits agree with the Ninth Circuit that the two standards are not identical. *Carvajal-Munoz v. INS*, 743 F.2d 562, 575 (7th Cir. 1984); *Garcia-Mir v. Smith*, 766 F.2d 1478, 1490 (11th Cir. 1985).

60. 749 F.2d 1316 (9th Cir. 1984), as amended on denial of reh'g and of reh'g en banc, 767 F.2d 1277 (9th Cir. 1985).

61. See *supra* note 59.

62. 767 F.2d at 1282.

63. *Id.* at 1283 n.11. These sources of law include other court decisions, law review articles, and the UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter cited as HANDBOOK]. The Ninth Circuit has looked to the Handbook as a significant source of guidance to the meaning of the terms in the Protocol. See *supra* note 8; *Hernandez-Ortiz v. INS*, 777 F.2d 509, 514 n.3 (9th Cir. 1985); *Zavala-Bonilla v. INS*, 730 F.2d 562, 567 n.7 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981).

64. 767 F.2d at 1283.

that his or her life or freedom is actually threatened, while an alien who qualifies under section 208(a) may have only established the existence of a valid reason for fear.”⁶⁵ As a procedural matter the court found that the section 243(h) claim should be reviewed first since “if the court concludes that the alien met the clear probability standard, it need go no farther since the well-founded fear standard will, *a fortiori*, also have been met.”⁶⁶

In analyzing Bolanos’ withholding of deportation request under section 243(h), the court also established a relatively lenient evidentiary burden under the “clear probability” standard.⁶⁷ For example, it stated that general documentary evidence regarding oppressive conditions is relevant to support more specific evidence of the alien’s likelihood of persecution.⁶⁸ Further, the court held that uncorroborated statements alleging prior threats are sufficient to satisfy the section 243(h) withholding standard.⁶⁹ The court held that Bolanos satisfied the clear probability test and thus *a fortiori* had satisfied the well-founded fear test. Thus, the court’s statements on the well-founded fear standard probably should be regarded as dicta.⁷⁰

In *Cardoza-Fonseca v. INS*,⁷¹ however, the petitioner appealed only the denial of asylum relief under section 208.⁷² The court was, therefore, faced with rendering a definitive ruling on the section 208 asylum standard of proof. In *Cardoza-Fonseca*, also authored by Judge Reinhardt, the court’s textual analysis of section 243(h) and section 208 reinforced its previously stated view that the standards of proof for the two forms of relief are not identical. Further, the court held that “[t]here is a significant practical consequence to the fact that different analyses are required under the two standards.”⁷³ In contrasting the two standards, Judge Reinhardt wrote:

65. *Id.* The court also stated its belief that “an evaluation of whether an alien has a well-founded fear includes consideration of the alien’s state of mind . . . as well as an evaluation of ‘conditions in the country of origin, its laws and the experiences of others’ ‘A desire to avoid a situation entailing the risk of persecution may be enough’ to satisfy the well-founded fear test.” (citations omitted). *Id.* n.11.

66. *Id.*

67. *Id.* at 1283-86. The court emphasized that the form of relief provided by the amended mandatory § 243(h) provision is more appropriately described as a “prohibition against deportation” rather than a “withholding of deportation.” *Id.* at 1282.

68. *Id.* at 1285-86 (“general corroborative evidence, such as documentary evidence may be most useful [to evaluate if a threat should be taken seriously]”). *See infra* text accompanying notes 188-95.

69. 767 F.2d at 1285 (“[a]uthentic refugees rarely are able to offer direct corroboration of specific threats”). *See infra* text accompanying notes 221-28; *accord* *Medrano-Martinez v. INS*, No. 84-7206 (9th Cir. Nov. 15, 1985).

70. 767 F.2d at 1288.

71. 767 F.2d 1448 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3561 (U.S. Feb. 25, 1986) (No. 85-782).

72. *Id.* at 1450.

73. *Id.* at 1452.

The term "clear probability" requires a showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of the fear need not be greater than fifty percent.⁷⁴

The court rejected the government's interpretation that the "well-founded fear" standard "is rendered entirely subjective."⁷⁵ Instead, the court ruled that in order to satisfy the well-founded fear standard:

Applicants must point to specific, objective facts that support an inference of past persecution or risk of future persecution. That the objective facts [can be] established through the credible and persuasive testimony of the applicant does not make those facts less objective It is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land became relevant.⁷⁶

By fashioning a realistic standard for determining asylum claims, the court emphasized its concern that the humanitarian motives of the Refugee Act of 1980 to protect genuine refugees would not be defeated by "stringent documentary requirement[s]."⁷⁷ The court's clear articulation of the well-founded fear standard supports its oft-stated view that asylum-seekers are faced with extremely difficult problems of proof.⁷⁸

In remanding *Cardoza-Fonseca* to the BIA for reconsideration of the section 208 request under the well-founded fear standard, the court was critical of the BIA's use of purportedly alternative stan-

74. *Id.* at 1452-53.

75. 767 F.2d at 1453 (emphasis added). The United States Supreme Court had characterized *Stevic's* position in this same manner. *Stevic*, 104 S. Ct. at 2492-93 ("[*Stevic*] argues that . . . the well-founded-fear-of-persecution standard turns almost entirely on the alien's state of mind").

76. 767 F.2d at 1453.

77. *Id.* Review of § 208 decisions involves a two-step analysis. The decision regarding eligibility as a refugee for asylum protection will be reviewed under a substantial evidence standard of review. *See supra* note 44. The grant or denial of asylum as a matter of discretion will be reviewed under an abuse of discretion standard. *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985); *Estrada v. INS*, 775 F.2d 1018, 1021 (9th Cir. 1985); *Chatila v. INS*, 770 F.2d 786, 789 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1282 n.9 (9th Cir. 1985).

78. *See, e.g., Bolanos-Hernandez*, 767 F.2d at 1285 ("persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution"); *Zavala-Bonilla v. INS*, 730 F.2d 562, 565 (9th Cir. 1984) ("[the applicant] could hardly ask authorities in El Salvador to certify that she would be persecuted should she return").

dards of proof.⁷⁹ The Board had ruled that Cardoza-Fonseca's claim that she "would be persecuted" failed under the "clear probability," "good reason," or "realistic likelihood" test.⁸⁰ The court found the Board's ruling to be disingenuous because the Board had clearly held, in *In re Acosta*,⁸¹ that there is no difference between the clear probability and well-founded fear standards.⁸² The Ninth Circuit ruled that the Board's error could not be cured by de novo review by the court under the correct standard. Instead, reconsideration by the BIA under the proper standard was required.⁸³

In decisions following *Bolanos-Hernandez* and *Cardoza-Fonseca*, the court has consistently applied the separate and distinct standards of proof to section 208 and section 243(h) requests.⁸⁴ In distinguishing between the two standards of proof, it continues to emphasize that asylum requires a showing of a *possibility* of persecution, but withholding of deportation requires a showing of a *probability* or *likelihood* of persecution.⁸⁵ For example, in *Garcia-Ramos v. INS*, where the court rejected the applicant's proof as insufficient to fulfill the higher degree of probability of persecution required by section 243(h), the court nonetheless found sufficient evidence to establish a well-founded fear of persecution, if the applicant's testimony was believable.⁸⁶

79. *Cardoza-Fonseca*, 767 F.2d at 1454.

80. *Id.* at 1450.

81. Interim Dec. 2986 (BIA Mar. 1, 1985).

82. *Id.* at 19-20; *Cardoza-Fonseca* 767 F.2d at 1454 ("the Board appears to feel that it is exempt from the holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and not constrained by circuit court opinions").

83. *Cardoza-Fonseca*, 767 F.2d at 1455.

84. See, e.g., *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985); *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Estrada v. INS*, 775 F.2d 1018 (9th Cir. 1985); *Chatila v. INS*, 770 F.2d 786 (9th Cir. 1985); *Cruz-Canales v. INS*, No. 84-7075 (9th Cir. Nov. 21, 1985); *Medrano-Martinez v. INS*, No. 84-7206 (9th Cir. Nov. 15, 1985); *Lopez-Calderon v. INS*, No. 84-7362 (9th Cir. Nov. 13, 1985); *Rosales-Perez v. INS*, No. 83-7278 (9th Cir. Oct. 8, 1985); *Figueroa-Polio v. INS*, No. 84-7240 (9th Cir. Aug. 20, 1985).

85. *Garcia-Ramos*, 775 F.2d at 1370; accord *Hernandez-Ortiz*, 777 F.2d at 509. The reported and unreported decisions emphasize that "well-founded fear" is a more generous standard. See, e.g., *Lopez-Calderon v. INS*, No. 84-7362, slip op. at 2-3 (9th Cir. Nov. 13, 1985); *Rosales-Perez v. INS*, No. 83-7278, slip op. at 3 (9th Cir. Oct. 8, 1985).

86. *Garcia-Ramos*, 775 F.2d at 1374. The court stated: [T]he phrase "well-founded fear" embodies both subjective and objective elements The word "fear" connotes subjective considerations . . . thus requiring an evaluation of an applicant's state of mind That the fear must be "well-founded" implicates a requirement of objective reasonableness. In other words, there must be some basis in reality or reasonable possibility that a petitioner would be persecuted In this regard, the "conditions in the country of origin, its laws, and the experience of others" are relevant factors to consider.

The court cited *Bolanos-Hernandez*, 767 F.2d at 1282-83 & n.11, and HANDBOOK, *supra* note 63, ¶ 37, for the principles in its description of the well-founded fear standard;

The court remanded the case to the Board explicitly stating that if Garcia-Ramos' testimony was found credible, he had met his burden of proof for asylum. The court remanded to the BIA to review the record in light of the legal standards articulated by the court, to correct any factual errors (specifically pointing out one factual error in the decision), and to make the required credibility findings.⁸⁷ Similarly, in the unpublished case of *Medrano-Martinez v. INS*, the court remanded to the Board for a credibility determination where "it [was] unclear whether the BIA evaluated the petitioner's claim discretely under the appropriate standards."⁸⁸ The court advised the Board to evaluate the withholding of deportation claim under the proper standards and then review the asylum claim under the more generous "well-founded fear" standard.⁸⁹

In *Chatila v. INS*,⁹⁰ however, the panel disagreed with the viewpoint that the circuit court must remand the case to the Board in instances where the Board opinion uses alternative language or is unclear in its description of the standard of proof it has applied. The Board's decision in *Chatila* rejected, as it had in *Cardoza-Fonseca*, the applicant's claim "whether we apply a standard of 'clear probability,' 'good reason' or 'clear likelihood.'"⁹¹ The *Chatila* court ruled that use of the alternative language was a recognition by the BIA of the difference between the clear probability and well-founded fear standards.⁹² Further, the *Chatila* decision makes no explicit reference to the BIA's holding in *In re Acosta* that the governing standards of proof are identical for both forms of relief from deportation.⁹³ This was the position specifically rejected by the *Cardoza-Fonseca* panel, which ordered a remand to the BIA for consideration

accord *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Lopez-Calderon v. INS*, No. 84-7362, slip op. at 3 (9th Cir. Nov. 13, 1985).

87. *Garcia-Ramos*, 775 F.2d at 1374-75.

88. *Medrano-Martinez v. INS*, No. 84-7206, slip op. at 3 (9th Cir. Nov. 15, 1985).

89. *Id.* at 3. See also *Cruz-Canales v. INS*, No. 84-7075, slip op. at 2 (9th Cir. Nov. 21, 1985) (court ordered remand to BIA "in light of recent decisions of this circuit regarding the definition of 'well-founded fear of persecution'" and to consider evidence of petitioner's public radio statement of criticism of Salvadoran government).

90. 770 F.2d 786 (9th Cir. 1985).

91. *Id.* at 790.

92. *Id.*

93. See also *Lopez-Calderon v. INS*, No. 84-7362, slip op. at 3 (9th Cir. Nov. 13, 1985) ("the correct burden of proof was applied by the BIA and the Immigration Judge"); *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985) (the BIA expressly stated that it applied the "lesser standard" of good reason to fear persecution); *Sorto-Castro v. INS*, No. 83-7690 (9th Cir. Sept. 4, 1985); *Ballard v. INS*, No. 84-7340 (9th Cir. Aug. 9, 1985).

of the asylum request under the correct legal standard.⁹⁴

Summary

The United States Supreme Court decision in *INS v. Stevic* requires an evaluation of an application for withholding of deportation under the “clear probability” or “more likely than not” standard of proof.⁹⁵ The *Stevic* decision left open the question of the standard of proof applicable to asylum under section 208.⁹⁶

The Ninth Circuit has elaborated on the meaning of the “clear probability” test. In *Bolanos-Hernandez*, the court ruled that a “clear probability of persecution” could be established by a petitioner’s testimony of direct threats of persecution, even if presented without independent corroborating evidence.⁹⁷ In addition, the court ruled that general documentary evidence about oppressive conditions, coupled with specific testimony and evidence of the alien’s likelihood of persecution can satisfy the standard of proof requirements under section 243(h).⁹⁸

As to asylum under section 208, the Ninth Circuit has clearly stated that the first step of an asylum determination is to ascertain the applicant’s eligibility as a “refugee.” A refugee must establish that he or she has a “well-founded fear of persecution,” a standard which the court unequivocally has held is “more generous” than the clear probability of persecution standard.⁹⁹ To demonstrate well-founded fear, a refugee must show his subjective fear of persecution is genuine and that the fear is objectively reasonable. An applicant’s own statement may provide that objective basis when it details the bases for this fear of persecution. The desire to avoid a situation entailing the risk of persecution may satisfy the well-founded fear standard. This standard for asylum is concerned with the *possibility* of persecution; the clear probability standard for withholding of deportation is concerned with the *probability* of persecution.¹⁰⁰

The Ninth Circuit has not developed a uniform position regarding the remedy available to the applicant if the underlying BIA decision does not articulate the standard applied in its review of the asylum and withholding application or if the BIA applied an incorrect standard. For example, in *Cardoza-Fonseca*, the Ninth Circuit addressed

94. See *supra* text accompanying notes 79-83. Cf. *Rosales-Perez v. INS*, No. 83-7728 (9th Cir. Oct. 8, 1985) (Nelson, J., dissenting) (where BIA made no explicit ruling on standard it used to assess asylum application, decision was difficult to review on appeal and should be remanded for application of proper standard).

95. See *supra* text accompanying notes 55-57.

96. See *supra* text accompanying notes 53-54.

97. See *supra* text accompanying note 69.

98. See *supra* text accompanying note 68.

99. See *supra* text accompanying note 62.

100. See *supra* text accompanying notes 73-76.

the content and meaning of the well-founded fear standard and the appropriate remedy. The court ruled that the BIA's finding in *In re Acosta* that asylum applications are not governed by the distinct, more liberal well-founded fear standard, was in contravention of Ninth Circuit holdings and thus required remand of an asylum request to the BIA for consideration under the appropriate well-founded fear standard.¹⁰¹ But in several other cases, the Ninth Circuit panel evaluated the applications for asylum and withholding of deportation under the correct standard and did not order a remand for the Board to engage in a similar analysis.¹⁰²

Persecution

Scope and Nature of Persecution

To substantiate a request for asylum under section 208, an alien must demonstrate that he or she has a "well-founded fear of *persecution*;" to obtain withholding of deportation, an alien must show that "his life or freedom would be threatened."¹⁰³

In *Cardoza-Fonseca*, the Ninth Circuit ruled that:

The term "persecution" includes more than just restrictions on life and liberty [T]he statutory term "persecution" in the "well-founded fear of persecution" standard encompasses more than the statutory term "threat to life or freedom" and thus more than the non-statutory term "persecution" used in the judicially established "clear probability of persecution" standard.¹⁰⁴

The legal distinction between "persecution" and "threat to life or freedom," as articulated in *Cardoza-Fonseca*, appears to be a by-product of the *Stevic* ruling that the asylum and withholding of deportation remedies are distinct. But no other court decisions either before or after *Stevic* have compared the two terms or interpreted

101. See *supra* text accompanying notes 79-83.

102. Compare cases cited *supra* notes 90 & 93 with cases cited *supra* notes 85 & 89.

103. See INA § 243(h), 8 U.S.C. § 1253(h) (1982) and text accompanying note 15.

104. *Cardoza-Fonseca*, 767 F.2d at 1452; cf. *INS v. Stevic*, 104 S. Ct. 2489, 2500 n.22 (1984) (Persecution is a "seemingly broader concept than threat to life or freedom"). *HANDBOOK*, *supra* note 63, ¶ 51 ("[f]rom Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom . . . is always persecution. Other serious violations of human rights . . . would also constitute persecution"). *Contra In re Lam*, 18 I.& N. Dec. 15, 17 n.3 (BIA 1981) ("[a]lthough section 243(h) was amended by the Refugee Act to substitute 'life or freedom would be threatened' for 'persecution' we have, after examining the legislative history of the new Act, held that this *broader choice of words* in the Refugee Act was not intended to change the prior law requiring persecution by the government . . .") (emphasis added).

the phrase "threat to life or freedom."¹⁰⁵ For all practical purposes, judicial construction of the term "persecution" is the only guide to the court's interpretation of both the phrases "persecution" and "threat to life and freedom," since "threat to life and freedom" has not been construed to have a definitive meaning independent of a reference to the term "persecution."¹⁰⁶ Therefore, cases, even those that predate the Refugee Act of 1980, that discuss the term "persecution" are useful in developing a contemporary analysis of this element of proof under both the current asylum and withholding provisions.

In *Kovac v. INS*, a 1969 Ninth Circuit case, the court defined the term "persecution" as follows: "No doubt 'persecution' is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience [T]he word 'persecution' ordinarily conveys the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive."¹⁰⁷ Although the *Kovac* definition provides limited guidance as to the exact meaning of the word "persecution," it continues to be the most often cited authority on the term's meaning.¹⁰⁸

In one recent case, *Hernandez-Ortiz v. INS*, the court undertook the difficult task of refining the *Kovac* definition and determining in what circumstances threats or violence constitute "political persecution."¹⁰⁹ In that case, the court suggested the following framework for determining when persecution occurs:

Persecution occurs only when there is a difference between the persecutor's view or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate [citations omitted]. For this reason, in determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor.¹¹⁰

Other recent cases have refined the *Kovac* definition by negative example. The court consistently has stated that the persecution ele-

105. *But see* *Espinosa-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985) (Ferguson, J., dissenting) ("[t]he major premise [of the majority opinion] misstates the law. Section 243(h) does not state that the threat to freedom must be severe. The words are 'freedom would be threatened'").

106. Judicial authority prior to *Stevic* tended to merge the two terms. *See, e.g., McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981) ("likelihood of persecution, i.e., a threat to life or freedom").

107. 407 F.2d 102, 107 (9th Cir. 1969) (citation omitted).

108. *See, e.g., Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985); *Cardoza-Fonseca*, 767 F.2d at 1452; *Sagermark v. INS*, 767 F.2d 645, 649-50 (9th Cir. 1985); *Artukovic v. INS*, 639 F.2d 894, 897 (9th Cir. 1982) (term "persecution" is not unconstitutionally vague [citing *Kovac*]); *Moghanian v. United States Dept. of Just.*, 577 F.2d 141, 142 (9th Cir. 1978) ("the . . . lenient definition of 'persecution' found in *Kovac*"); *In re Dunar*, 14 I. & N. Dec. 310, 320 (BIA 1973).

109. 777 F.2d 509, 516 (9th Cir. 1985).

110. *Id.*

ment cannot be established by allegations of widespread violence, anarchy, or unrest which equally affect all citizens of the applicant's homeland.¹¹¹ The court also rejected as satisfying the persecution element of proof claims of generalized economic disadvantage,¹¹² decline in the political fortunes of the applicant's family,¹¹³ or loss of the applicant's family land due to a land reform program.¹¹⁴

The court also has ruled that an order confining the applicant to quarters by his superiors in the Nicaraguan Army is not an example of past persecution but instead a "relatively mild punishment."¹¹⁵ In addition, incidents in which the applicant was detained by government security forces for an identification check are not, standing alone, sufficient to demonstrate persecution.¹¹⁶

Prosecution v. Persecution

An applicant who alleges that his prosecution for a variety of criminal offenses is a guise for persecution must demonstrate that

111. *Maroufi v. INS*, 772 F.2d 597, 599 (9th Cir. 1985); *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984); *Lopez-Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Martinez-Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir. 1982); *see also Flores-Ponce v. INS*, No. 83-7742 (9th Cir. July 10, 1985); *Sanchez-Reyes v. INS*, No. 83-7977 (9th Cir. Jan. 21, 1985); *Palacios-Castro v. INS*, No. 83-7275 (9th Cir. Oct. 1, 1984). *But cf. Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (9th Cir. 1985) (evaluation of the significance of a specific threat to an individual's life and freedom will not be lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened). *See also Pino-Valencia v. INS*, No. 83-7036, slip op. at 3 (9th Cir. July 26, 1984). The court commented in this unpublished opinion:

Pino-Valencia's evidence presents the all too familiar picture of a turbulent and dangerous local situation in which his country's government is unwilling or unable to protect the safety and human rights of the inhabitants of much of its territory. Pino-Valencia presents the understandable desire of a young, vulnerable person in a tragically unsafe country to emigrate to a country that offers a safer and better life However, the requirement of proof is a reasonable, indeed essential, element of satisfying the statute's purpose of according asylum to those who would suffer persecution.

Id.

112. *Raass v. INS*, 692 F.2d 596 (9th Cir. 1982). *Cf. Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (under the § 243(h) amendments of 1965, deliberate imposition of substantial economic disadvantage is required).

113. *Shoae v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983).

114. *Figuerola-Polio v. INS*, No. 84-7240, slip op. at 3 (9th Cir. Aug. 30, 1985).

115. *Espinosa-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985).

116. *Figuerola-Polio*, No. 84-7240, slip op. at 3; *accord Ramirez v. INS*, No. 84-7500, slip op. at 3 (9th Cir. Aug. 20, 1985) ("[a]lthough he was stopped and questioned on occasion by the National Guard, he admits he was never imprisoned or mistreated, and his testimony suggests that these were nothing more than routine stops for identification").

the consequences he faces on return are political in nature.¹¹⁷

On several occasions, the court has ruled that prosecution for military desertion does not constitute "the type of persecution that we are concerned with in [withholding of deportation] proceedings."¹¹⁸ For example, in *Castro-Magana v. INS*, where the applicant alleged that the Salvadoran army kills deserters, such as himself, he had to provide proof that the killings occur and that this punishment is politically motivated.¹¹⁹ Similarly, punishment for a crime or for a breach of contract is not sufficient for section 243(h) purposes unless the applicant can demonstrate a discriminatory application of the penal law in his home country.¹²⁰

In one unpublished opinion, however, the court endorsed the Fifth Circuit ruling in *Coriolan v. INS*¹²¹ that "prosecution for the offense of illegal departure can amount to persecution" if the alien can substantiate that the government of his country "carried out a policy of persecuting those who have illegally fled the country."¹²²

Agents of Persecution

In *McMullen v. INS*, the Ninth Circuit's description of the elements necessary for withholding of deportation includes the likelihood of persecution "by the government or by a group which the government is unable to control."¹²³ In addition, an asylum or withholding of deportation applicant can allege that he fears persecution by *both* the government *and* forces the government cannot control, such as guerrillas.¹²⁴ In *Cruz-Castanaza v. INS*, however, where the petitioner alleged that he had received death threats on the telephone but did not specify whom he suspected of placing the calls, he

117. *Kovac*, 407 F.2d at 104 (asylum may be granted if applicant who deserted ship would afterward be punished for violating a politically motivated prohibition against defection from a police state); *In re Janus and Janek*, 12 I.& N. Dec. 866, 875 (BIA 1968) (applicant's illegal departure resulted in convictions for defection; constituted persecution for political offenses, not punishment for violation of criminal statute).

118. *Espinosa-Martinez*, 754 F.2d at 1540; *accord* *Shah v. INS*, No. 82-7341 (9th Cir. Sept. 10, 1984); *Hussain v. INS*, No. 82-7104 (9th Cir. Apr. 29, 1983); *Afzal v. INS*, No. 80-7180 (9th Cir. Sept. 2, 1981).

119. *Castro-Magana v. INS*, No. 83-7378, slip op. at 6. *But cf.* *Saballo-Cortez v. INS*, 749 F.2d 1354 (9th Cir.), *as amended*, 761 F.2d 1259, 1270 (9th Cir. 1984) (Pregerson, J., dissenting) ("[e]ven if one characterizes Saballo-Cortez as a Nicaraguan army evader, it is hard to imagine how repeated threats, including a threat of being found dead in a field with one's eyes filled with ants, could ever 'be interpreted as legitimate legal sanctions'").

120. *Hafeez v. INS*, No. 81-7453, slip op. at 4 (9th Cir. Dec. 1, 1982).

121. 559 F.2d 993, 1000 (5th Cir. 1977).

122. *Lopez-Canas v. INS*, No. 83-7849, slip op. at 3 (9th Cir. Dec. 5, 1984). *Cf.* *Castro-Magana v. INS*, No. 83-7378, slip op. at 2-3 (9th Cir. Sept. 25, 1984).

123. 658 F.2d at 1315; *accord* *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (9th Cir. 1985); *Zepeda-Melendez v. INS*, 741 F.2d 285, 289 (9th Cir. 1984).

124. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1390, 1399 (9th Cir. 1985); *Zepeda-Melendez*, 741 F.2d at 287, 289.

failed to satisfy the *McMullen* requirement of showing that the callers were either government officials or members of a group the government is unable or unwilling to control.¹²⁵

The applicant for asylum or withholding of deportation must also demonstrate that the potential persecutors have the capacity, ability, and will to carry out the acts of persecution.¹²⁶ In *Bolanos-Hernandez*, the petitioner alleged that guerrillas had threatened him before his departure from his native El Salvador. The court recognized the seriousness of that threat by reference to two sources of information. First, the court evaluated general documentary evidence, such as newspaper accounts which "note[d] . . . the executions conducted in retaliation for refusals (like petitioner's) to join political guerilla groups."¹²⁷ Second, it credited the petitioner's testimony regarding the assassination of five of his friends because of their refusal to join the guerrillas, and the allegation that his brother may also have been killed by the same group.¹²⁸

Similarly, in *Argueta v. INS*, the petitioner alleged he had received threats from a rightist group known as the "Squadron of Death."¹²⁹ The applicant's statement regarding the torture-killing of his close friend by the same group substantiated the likelihood of the persecutors carrying out their threats against him.¹³⁰

Summary

The pre-Refugee Act case, *Kovac v. INS*, contains the Ninth Circuit's most enduring commentary on the term persecution, defining it as "the infliction of suffering or harm upon those who differ . . . in a

125. *Cruz-Castanaza v. INS*, No. 84-7040, slip op. at 2-3 (9th Cir. June 27, 1985); *accord* *Rosales-Perez v. INS*, No. 83-7278, slip op. at 2 (9th Cir. Oct. 8, 1985) (petitioner feared persecution because of murder of friends, but had no idea who committed the murders); *Estrada v. INS*, 775 F.2d 1019, 1021 (9th Cir. 1985) (applicant could not identify any of the "private groups" he purportedly feared); *Ramirez v. INS*, No. 84-7500, slip op. at 3 (9th Cir. Aug. 22, 1985) (applicant could not identify who shot him in the leg in 1977).

126. *Bolanos-Hernandez*, 767 F.2d at 1285-86; *accord* *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985) (petitioner provided adequate documentation that a threat of persecution from "security forces" in El Salvador is to be taken seriously); *Sarvia-Quintanilla*, 767 F.2d at 1394 ("none of [the petitioner's] supporting evidence directly supports the contention that the F.R.S. [the guerilla organization which the applicant feared would persecute him] is inclined or able to persecute those who disagree with their objectives or strategies").

127. *Bolanos-Hernandez*, 767 F.2d at 1286.

128. *Id.*

129. 759 F.2d 1395, 1396 (9th Cir. 1985).

130. *Id.* at 1397 n.3.

way regarded as offensive.”¹³¹ In *Hernandez-Ortiz v. INS*, the court added a new gloss to *Kovac* by ruling that the motivation of the persecutor is relevant in determining whether threats and violence constitute political persecution.¹³² The Ninth Circuit also has ruled that the following situations do *not* constitute persecution: widespread violence, anarchy and unrest equally affecting all citizens, or economic disadvantage or decline.¹³³ Additionally, prosecution for a criminal offense will ordinarily not be considered persecution unless the applicant can demonstrate that the punishment he faces is politically motivated. But an application for withholding of deportation or asylum can allege that the feared persecution may occur at the hands of the government or groups which the government cannot control.¹³⁴

Bases: Race, Religion, Nationality, Membership in a Particular Social Group, or Political Opinion

The Refugee Act limits the availability of the protections of asylum and withholding of deportation to persons who can demonstrate that their fear of persecution or threat to life or freedom is based on one of five factors: race, religion, nationality, membership in a particular social group, or political opinion.¹³⁵

Political Opinion

The most commonly invoked basis for asylum and withholding of deportation requests has been political opinion. In analyzing the “political opinion” basis, the court most often has examined indicia commonly associated with an overt manifestation of political opinion. For example, in *Zavala-Bonilla v. INS*, the court reversed the BIA ruling as it found credible the applicant’s statements regarding her active political participation in a trade union in her native El Salvador.¹³⁶ The applicant was an executive official in the union and had participated in strike activities in which she was personally confronted and harassed by state police.¹³⁷

In *Canjura-Flores v. INS*, the court reversed the BIA’s denial of asylum and withholding of deportation where the applicant in uncontroverted testimony stated that he was an active member of a leftist organization, participated in public meetings and protest marches

131. See *supra* text accompanying notes 107-08.

132. See *supra* text accompanying notes 109-10.

133. See *supra* text accompanying notes 111-14.

134. See *supra* text accompanying notes 123-24.

135. See *supra* note 15 and text accompanying note 26.

136. 730 F.2d 562, 565, 567 (9th Cir. 1984).

137. *Id.* at 563, 565.

and distributed propaganda and painted slogans.¹³⁸ In the recent unpublished case, *Cruz-Canales v. INS*, the court remanded to the Board for reconsideration where uncontested evidence existed that the petitioner had publicly broadcast his political views in a television interview by stating that the Salvadoran government was responsible for the killing of a prominent Salvadoran priest and expressing his belief that rich people exploit the poor.¹³⁹

Where advocacy, membership in organizations, and other typical indicators of political opinion are absent, the Ninth Circuit, until very recently, generally rejected the appeal. For example, in *Saballo-Cortez v. INS*, the court upheld the immigration judge and BIA findings that "there was no evidence that Saballo-Cortez belonged to any political organization or had taken any political opinion."¹⁴⁰ Similarly, in three recent unpublished opinions, the BIA's denial of relief was affirmed, in part because of the applicant's lack of a demonstrated political opinion. In one case, the applicant testified "that he never belonged to any political group or expressed anti-government views while in El Salvador."¹⁴¹ In another, the panel pointed out that the applicant "did not list membership in any organization in his asylum application," nor was there evidence that he was "politically active."¹⁴² In the third case, the court noted that the applicant "had never belonged to any political organizations, had never publicly expressed opposition to the Nicaraguan government and had never been arrested in Nicaragua."¹⁴³ Even where an appli-

138. No. 83-7890, slip op. at 6 (9th Cir. Sept. 24, 1985). Cf. *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985) (participation in political organization's activities, such as distributing propaganda, painting slogans and participating in demonstrations, sufficient for asylum eligibility if testimony is believable; remanded for credibility findings); *Samimi v. INS*, 714 F.2d 992, 995 (9th Cir. 1983) (applicant's outspoken opposition to Khomeini government a key factor in court's decision to reopen his case for hearing on the applications for asylum and withholding of deportation).

139. No. 84-7075, slip op. at 2 (9th Cir. Nov. 21, 1985).

140. 761 F.2d 1259, 1264 (9th Cir. 1984). Judge Pregerson's lengthy dissent specifically took issue with the majority on this point. After reviewing the transcript, he stated that "[Saballo-Cortez'] refusals to join the militia or the Sandinista Committee were based on his political opinion . . . [and] other statements by Saballo-Cortez at the hearing indicate that his problems with Nicaraguan authorities stemmed from his refusal, for political reasons, to support the Sandinista effort." *Id.* at 1268-69 (Pregerson, J., dissenting) (emphasis in original).

141. *Figueroa-Polio v. INS*, No. 84-7240, slip op. at 3 (9th Cir. Aug. 30, 1985).

142. *Solano-Martinez v. INS*, No. 83-7320, slip op. at 2 (9th Cir. Aug. 29, 1985).

143. *Lanuza-Rosalez v. INS*, No. 84-7414, slip op. at 2 (9th Cir. July 10, 1985); see also *Rosales-Perez v. INS*, No. 83-7278, slip op. at 2 (9th Cir. Oct. 8, 1985) ("[t]here is no indication whatsoever that Rosales-Perez or any member of his family have ever been politically involved or implicated in any way"); *Turcios v. INS*, No. 83-7802, slip op. at 2 (9th Cir. Sept. 4, 1984) ("although threats had been made against

cant claimed that he attended and spoke at public meetings, a panel of the court, in an unpublished ruling, required that he be more specific and offer evidence that would tend to show that the government was aware of his activities.¹⁴⁴

Where the alleged danger the petitioner faces does not result from his political opinion, the court has ruled that he will not be eligible for either asylum or withholding of deportation protection. For example, in *Espinosa-Martinez v. INS*, the petitioner's allegation of confinement to quarters was not supported by any evidence that this action occurred "due to his political opinion."¹⁴⁵ In *Chavez v. INS*, the petitioner alleged that his former employment as a security guard and his ownership of a gun would subject him to possible persecution in El Salvador; however, the court ruled that these facts did not form a basis for protection within the meaning of the Refugee Act.¹⁴⁶ In a recent unpublished case, the petitioner testified that he operated an after-hours gambling establishment and was paying bribes to local police.¹⁴⁷ When he told the local police commander that he might not be able to pay his usual amount, the court found that "the death threat he received stemmed from his gambling activities and was not connected to his political opinions."¹⁴⁸

In *Bolanos-Hernandez*, however, Judge Reinhardt's opinion stated an important distinction from this more traditional line of thinking.¹⁴⁹ In *Bolanos-Hernandez*, the petitioner had consciously refused to join either the guerrillas or the army in El Salvador and had severed his past ties with a right-wing organization because of his wish "to remain neutral."¹⁵⁰ The court rejected the government's contention that neutrality is never political and ruled that "[c]hoosing to remain neutral is no less a political decision than is choosing to affiliate with a particular political faction When a person is aware

[the petitioners] because they were in the business of selling medicine to the government and the guerrillas, [they] conceded that they did not belong to any political or social group for which they would suffer persecution").

144. *Ramirez v. INS*, No. 84-7500, slip op. at 3 (9th Cir. Aug. 20, 1985).

145. 754 F.2d 1536, 1540 (9th Cir. 1985).

146. *Chavez v. INS*, 723 F.2d 1431, 1433 (9th Cir. 1984). Cf. *Rodriguez-Agustin v. INS*, 765 F.2d 782, 783 (9th Cir. 1985) (fear of persecution because of lack of official documentation does not fall within the meaning of the bases under § 208 or § 243(h)); *Zepeda-Melendez v. INS*, 741 F.2d 285, 287, 290 (9th Cir. 1984) (fear of persecution because of the strategic location of the applicant's family home, making it desirable to both guerrillas and the government does not fall within any of the bases enumerated in § 208 or § 243(h)); see also *Guerra-Magana v. INS*, No. 82-7044, slip op. at 2 (9th Cir. Nov. 19, 1982) (petitioner alleged that he had been shot at by "communist guerrillas" but "it does not appear that the alleged attacks were provoked by religious or even political differences").

147. *Sorto-Castro v. INS*, No. 83-7690 (9th Cir. Sept. 4, 1985).

148. *Id.* at 2-3.

149. 767 F.2d 1277 (9th Cir. 1985).

150. *Id.* at 1286.

of contending political forces and affirmatively chooses not to join any faction, that choice *is* a political one."¹⁵¹ In addition, the court unequivocally rejected the government's argument that the "motives of the individual who chooses neutrality must be examined by the court."¹⁵² The court ruled that Bolanos-Hernandez's act of refusing to join either faction is considered an affirmative expression of his political opinion as much as "joining [either] side or speaking for or against [either] side".¹⁵³

In *Argueta v. INS*, a different panel of the court, with one dissent, endorsed and by implication extended the *Bolanos-Hernandez* ruling. In that case, applicant Argueta (unlike Bolanos-Hernandez) never overtly manifested his refusal to join either the guerrillas or the government while in El Salvador.¹⁵⁴ Rather, Argueta merely stated at his hearing his "lack of agreement with, support for, or help to either side."¹⁵⁵ Judge Hug ruled that Argueta's testimony did establish his political opinion.¹⁵⁶

In *Del Valle v. INS*, the court further expanded the *Bolanos-Her-*

151. *Id.* (emphasis in original). The court analogizes the political nature of a choice of neutrality to a "nation's decision to remain neutral" (citing the Neutrality Act of 1939, 22 U.S.C. §§ 441-465 (1982)). *Id.*

152. The court ruled that:

First, it is simply improper for the government to inquire into the motives underlying an individual's political decisions. Second, the motives . . . will be both complex and difficult to ascertain . . . Third . . . it is irrelevant why the individual made his choice. It does not matter to the persecutors what the individual's motivation is. The guerrillas in El Salvador do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

Id. at 1287 (footnote omitted).

In note 18, the court states that it is not deciding "whether a failure to join any side, absent a conscious choice, represents a political decision . . . nor need we decide here whether a failure to join a *particular* side, absent more, constitutes the expression of a political opinion." *Id.* n.18 (emphasis in original).

153. *Id.* at 1287 (citations omitted). *Cf. Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985) (applicant did not make affirmative choice of political neutrality; testimony indicated he was apathetic and had no opinion on how his native El Salvador should be governed).

154. 759 F.2d 1395 (9th Cir. 1985).

155. *Id.* at 1397 n.3.

156. He further stated:

It is apparent the [immigration judge] erroneously assumed that it was necessary for Argueta to prove his allegiance to a particular political faction. Argueta's testimony indicated that he had affirmatively chosen to remain politically neutral. We therefore conclude that Argueta's decision to remain neutral constituted an expression of political opinion.

Id. at 1397.

nandez ruling by holding that an applicant's refusal to join a *particular* side could constitute an expression of political opinion.¹⁵⁷ In that case, the applicant was approached for recruitment on several occasions by the Squadron of Death in El Salvador.¹⁵⁸ His refusal to join, coupled with his continued pursuit of his studies and his work in a community sports project, constituted specific evidence of his neutral convictions.¹⁵⁹ The court held: "Del Valle has . . . made a considered choice to take a neutral stance [citing *Bolanos*] and, based upon his past persecution, is likely to be persecuted for maintaining his political neutrality if he returns."¹⁶⁰

The views expressed in *Bolanos-Hernandez* and its progeny regarding political neutrality as an expression of political conscience carve out an important exception to the long-entrenched view that only overt acts of political expression constitute "political opinion" within the meaning of refugee protection provisions.¹⁶¹ Moreover, in *Hernandez-Ortiz v. INS*, the court specifically rejected a universal requirement of direct political expression or participation by the applicant, be it neutrality or affirmative advocacy, to establish eligibility for withholding of deportation or asylum on the basis of political opinion.¹⁶² Instead, Judge Reinhardt's opinion emphasized the *perception* of the *government* (or other persecuting agent), *not* the acts or views of the applicant, as the key factor in determining whether persecution on the basis of political opinion is likely. The court explained:

A government does not under ordinary circumstances engage in political persecution of those who share its ideology, only those whose views or philosophies differ, at least in the government's perception. It is irrelevant whether a victim's political view is neutrality, as in *Bolanos-Hernandez*, or disapproval of the acts or opinions of the government. Moreover it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does (citation omitted) When . . . an alien establishes a *prima facie* case that he is likely to be persecuted because of the government's belief about his views or loyalties, his actual political conduct, be it silence or affirmative advocacy, and his actual political views, be they neutrality or partisanship, are irrelevant; whatever the circumstances, the persecution is properly categorized as being "on account of . . . political opinion."¹⁶³

The court's decision recognizes that in most countries, a failure to act or express political views will not ordinarily "trigger retribu-

157. *Del Valle v. INS*, 776 F.2d 1407, 1414 (9th Cir. 1985).

158. *Id.* at 1409.

159. *Id.* at 1413-14.

160. *Id.* at 1414.

161. Compare text accompanying notes 149-60 with text accompanying notes 136-48.

162. 777 F.2d 509 (9th Cir. 1985).

163. *Id.* at 517.

tion."¹⁶⁴ But where a government acts against an individual or members of a group and there is no legitimate basis for that action, the court will apply a *presumption* that the government's action was politically motivated.¹⁶⁵ By so ruling, the court deliberately rejects a restrictive or mechanistic construction of the term "political opinion."¹⁶⁶

Group Bases

Each of the remaining four factors for asylum and withholding of deportation protection are based on the applicant's membership in a group, be it a racial, religious, national, or social group. The crux of the applicant's claim is that other members of the group have experienced persecution and, therefore, as a member of that same group, he or she has a reasonable fear of persecution.¹⁶⁷

The United Nations High Commissioner on Refugees (Handbook) expresses the view that "mere membership" in a racial, religious, community, or particular social group "will not normally be enough to substantiate a claim to refugee status."¹⁶⁸ The Handbook adds, however, that "there may be situations where, due to *special circumstances*, such membership will in itself be sufficient ground to fear persecution."¹⁶⁹

At the present time, the Ninth Circuit decisions provide little information regarding its view of the group bases for protection under

164. The court cites with approval HANDBOOK, *supra* note 63, ¶¶ 80-83 for the principle that the government's persecution of persons to whom it attributes certain political opinions is persecution on account of political opinion.

165. *Id.* at 516.

166. *Id.*

167. See, e.g., *Figueroa-Polio v. INS*, No. 84-7240, slip op. at 4 (9th Cir. Aug. 30, 1985) (persecution claim based on status as Catholic and a young adult male; the court held that the record failed to show persecution of either group, as a group, in El Salvador); *Aziz v. INS*, No. 84-7536, slip op. at 3 (9th Cir. Aug. 16, 1985) (an arrest nine years earlier for refusal to join the Ba'ath political party was not evidence of persecution for religious beliefs); *Ahmed v. INS*, No. 83-7173, slip op. at 2 (9th Cir. Dec. 7, 1983) (the applicant could provide "no specific example of similarly situated persons [*i.e.*, Muslims who convert to Christianity] in [his native] Pakistan [suffering persecution]").

168. HANDBOOK, *supra* note 63, ¶¶ 70, 73, 79.

169. *Id.* ¶¶ 73, 79. Cf. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985), which cited with approval the Handbook's definition of a social group as: "persons of similar *background*, habits or *social status* . . . membership of [sic] such a particular social group may be at the root of persecution because there is *no confidence in the group's loyalty to the Government* or because the *political outlook, antecedents* or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies." (emphasis in original).

HANDBOOK, *supra* note 63, ¶¶ 77-78.

the Refugee Act. For example, in the few cases where membership in the particular social group "young urban males" from El Salvador has been raised, little or no evidence was introduced to document the persecution of members of that social group.¹⁷⁰ Accordingly, the court rejected the petitioners' claims without stating its views on the nature and scope of the social group basis for asylum or withholding of deportation protections.¹⁷¹

In *Martinez-Romero v. INS*, the BIA ruling implied that had the applicant established that students in El Salvador were being persecuted, her motion to reopen to apply for asylum and withholding of deportation based on her membership in the social group of students might have been granted.¹⁷² On review, the court's two-paragraph opinion made no mention of the group basis for fearing persecution.¹⁷³ The court's ruling required the petitioner to demonstrate "special circumstances" before relief under section 208 or section 243(h) could be granted, but the court did not state what circumstances or conditions would satisfy that requirement.¹⁷⁴ Subsequent cases which cite with approval the "special circumstances" language also provide no insight into what the court means by that phrase.¹⁷⁵

170. *Lopez-Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Figueroa-Polio*, No. 84-7240, slip op. at 4; *Sanchez-Reyes v. INS*, No. 83-7977, slip op. at 2 (9th Cir. Jan. 21, 1985); *Lopez-Canas v. INS*, No. 83-7849, slip op. at 2-3 (9th Cir. Dec. 15, 1984). See also *Cruz-Castanaza v. INS*, No. 84-7040, slip op. at 3 (9th Cir. June 27, 1985) (membership in a group of young professionals not sufficient where there is "no suggestion that the leftists or the government actively persecute members of this social class").

171. *Lopez-Chavez*, 723 F.2d at 1434. But cf. *Canjura-Flores v. INS*, No. 83-7890, slip op. at 6 (9th Cir. Sept. 24, 1985) ("[t]he Board's findings that it was unlikely that the government would seek out Canjura-Flores because of his youth . . . conflict with the evidence," including the petitioner's uncontroverted statement and an Amnesty International report).

172. *In re Martinez-Romero*, 18 I. & N. Dec. 75, 79 (BIA 1982). In *In re Acosta-Solarzano*, Interim Dec. 2986 (BIA March 1, 1985), the Board elaborated on its interpretation of the term "persecution on account of membership in a particular social group." According to the Board that term means:

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties, in some circumstances it might be a shared past experience, such as former military leadership or land ownership . . . [W]hatever the common characteristic that defines the group, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id. at 24.

173. *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).

174. *Id.* at 595-96. The use of the "special circumstances" language in this decision is especially puzzling since the court makes no mention of the UNHCR Handbook provisions from which the phrase derives. See *supra* note 63.

175. See, e.g., *Zepeda-Melendez v. INS*, 741 F.2d 285, 290 (9th Cir. 1984); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984). See also *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984). But see generally Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39

In another case premised in part on the applicant's group affiliation, *Maroufi v. INS*, the court rejected a motion to reopen to apply for asylum and withholding of deportation where the only evidence supporting the applicant's persecution claim which was based on his support for the Mujahadeen, an opposition group in Iran, was his own conclusory statement that members of that group were being executed en masse.¹⁷⁶

In two recent cases, however, the court has ruled that evidence of persecution of members of applicant's family can form a basis for applications for asylum and withholding of deportation.¹⁷⁷ For example, in *Hernandez-Ortiz v. INS*, the court contrasted the applicant's evidence to that offered in *Maroufi* and ruled that "Hernandez-Ortiz, in contrast, has described numerous specific incidents in which members of her family—a small, readily identifiable group—have been the victims of threats and acts of violence. Her knowledge derives from her own communications with her family."¹⁷⁸ In a significant footnote, the court further clarified its position regarding group-based applications for asylum or withholding of deportation:

We did not intend to suggest in *Maroufi* that membership in a persecuted group is insufficient in itself to require a finding of eligibility for asylum or an order prohibiting deportation. Such a suggestion would squarely contradict history. Few could doubt, for example, that any Jew fleeing Nazi Germany in the 1930's or 40's would by virtue of his or her religious status alone have established a clear probability of persecution.¹⁷⁹

In *Del Valle v. INS*, the court stated that "there must be some evidence that the applicant or those similarly-situated are at a greater risk than the general population."¹⁸⁰ In that case, the applicant testified to the assassination of a cousin and the disappearance of a nephew. The testimony was corroborated by the testimony of the cousin's mother and by newspaper clippings and letters from El Salvador.¹⁸¹ The court ruled that the evidence suggested that his family was *particularly* affected by conditions in their home country and helped to support his claim for asylum.¹⁸²

The court has not ruled that membership in a persecuted family

(1983).

176. 772 F.2d 597, 599 (9th Cir. 1985).

177. *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985); *Del Valle v. INS*, 776 F.2d 1407 (9th Cir. 1985).

178. 777 F.2d 509, 516 (9th Cir. 1985).

179. *Id.* at 515-16 n.6 (citations omitted).

180. 776 F.2d 1407, 1411 (1985).

181. *Id.* at 1409-10.

182. *Id.* at 1413.

constitutes membership in a particular social group for purposes of the applicable Refugee Act provision. Nonetheless, these two decisions indicate the court's readiness to equate evidence of persecution of family members with evidence of persecution of persons in "similar situations," the cornerstone of proof in any group-based application for asylum or withholding of deportation.

Summary

The Ninth Circuit decisions, until very recently, analyzed the "political opinion" basis for asylum or withholding of deportation protection with reference to typical manifestations of political views such as trade union activism, participation in political organizations, participation in demonstrations and meetings, the making of speeches or broadcasts of one's views. The absence of such activity or the lack of connection between the applicant's described activity and any political viewpoint or group often doomed the applicant's appeal.

Four recent cases analyzing the claims of Salvadoran refugees recognize, however, that a hard and fast rule regarding overt political activity as required for political opinion-based applications is no longer universally appropriate.¹⁸³ For example, the traditional rule is inapplicable in situations where an applicant's neutrality is taken as a manifestation of political opinion by the potential persecutor or where the government perceives that the applicant holds oppositional views, even without overt act or affiliation on the part of the applicant. The court ruled that an applicant who consciously refused to join either the guerrillas or the army because he wished to remain neutral had made a political choice which constituted an overt manifestation of political opinion.¹⁸⁴ Additionally, the applicant's testifying as to his desire to remain neutral was ruled an expression of his political opinion¹⁸⁵ and the applicant's refusal to be recruited by the death squads in El Salvador also was held to be a manifestation of his political opinion.¹⁸⁶ Lastly, the court recognized that the government's perception of the applicant's political opinion is critical to an analysis of the application for asylum and withholding of deportation based on political opinion.¹⁸⁷

The Ninth Circuit has yet to review or discuss, to any significant extent, applications for asylum or withholding of deportation pre-

183. *See supra* text accompanying notes 149-66.

184. *See supra* text accompanying notes 149-53.

185. *See supra* text accompanying notes 154-56.

186. *See supra* text accompanying notes 157-60.

187. *Hernandez-Ortiz*, 777 F.2d at 516-17. The court ruled that the government's belief that an applicant holds oppositional views renders irrelevant his or her actual political views. Further, the government must be presumed to be politically motivated where it acts against individuals or groups without a legitimate basis.

mised on any of the group bases in the Refugee Act provisions. The few cases squarely raising group-based claims apparently did not provide sufficient evidence to warrant extensive discussion of the claim.

IMPLICATIONS OF THE NINTH CIRCUIT CASES: DOCUMENTATION AND EVIDENTIARY ISSUES

Introduction

The challenge raised by the discussion in the previous section of this Article is to translate an understanding of each of the elements of the asylum and withholding of deportation provisions into concrete evidentiary requirements. In this section, the Article will consider the nature, quality, and quantity of proof required to meet the burdens of proof for asylum and withholding of deportation.

The central issues in the documenting of requests for asylum and withholding of deportation fall under two major rubrics: those concerned with the applicant's own statement and those concerned with other forms of evidence. This Article will examine the kinds of documentation the Ninth Circuit has found useful in its analysis of specific cases. Further, the Article will discuss whether the applicant is always required to corroborate his own statement through extrinsic evidence. Lastly, the Article will explore the specific factors that the Ninth Circuit has used in assessing the credibility of the applicant.

Nontestimonial Evidence

General Documentary Evidence

The Ninth Circuit has held that "general information concerning the oppressive conditions [in the applicant's home country] is relevant to support specific information relating to an individual's well-founded fear of persecution."¹⁸⁸ That position is a clear rejection of the oft-expressed view of the BIA and some other courts that newspaper articles, human rights reports, and similar documents are not significantly probative on the issue of whether a particular individual would be subject to persecution if deported.¹⁸⁹

188. *Zavala-Bonilla v. INS*, 730 F.2d 562, 564 (9th Cir. 1984). *Cf.* *Nunez-Alfaro v. INS*, No. 83-7208, slip op. at 2-3 (9th Cir. Sept. 19, 1985) ("general evidence is insufficient unless the individual can also offer specific evidence that he would himself be singled out for persecution").

189. *See, e.g., Dally v. INS*, 744 F.2d 1191, 1196-97 (6th Cir. 1984) (a newspaper article which contained detailed information regarding the harassment of United States

In *Bolanos-Hernandez*, the court noted that newspaper articles concerning the human rights situation in El Salvador were useful in its task of determining whether Bolanos had a legitimate fear of persecution based on threats directed to him.¹⁹⁰ Similarly, in *Zavala-Bonilla v. INS*, where the asylum applicant was a union member, the court ruled that the BIA committed error when it disregarded general accounts of an increase in attacks on unions and heightened persecution of union members.¹⁹¹ In *Samimi v. INS*, newspaper articles describing mass executions of political opponents of the regime in Iran were acknowledged to be a key factor in the reopening of the petitioner's case.¹⁹²

In *Chatila v. INS*, however, the court rejected newspaper accounts that discussed general problems of terrorism and crime in Venezuela because they failed to provide "any evidence even remotely relevant to the question whether Mr. Chatila would be persecuted upon his return to Venezuela."¹⁹³ In a recent unpublished decision, the applicant's attorney did not submit to the immigration judge any of the available documentary evidence regarding the treatment of Guatemalan Indians such as the petitioner.¹⁹⁴ The court ruled that the attorney's actions did not constitute reversible error, since general documentary evidence is insufficient to satisfy the applicant's burden of proof "in the absence of specific evidence from which it can be inferred that the applicant would be persecuted."¹⁹⁵

Summary

The court has manifested its willingness to consider documents describing the general human rights situation and level of repression

immigrants of Iraqi origin such as the petitioner, who were critical of the Iraqi religious party, was rejected since it did not refer specifically to the petitioner); *In re Martinez-Romero*, 18 I. & N. Dec. 75, 79 (1982).

190. 767 F.2d 1277, 1285-86 (9th Cir. 1985). The court stated:

The newspaper articles introduced by Bolanos note the violent retribution that may follow the expression of political views in El Salvador and the executions conducted in retaliation for refusals to join political guerrilla groups. This general documentary evidence supports Bolanos' contention that he would suffer political persecution if returned to El Salvador.

Id. at 1286.

191. 730 F.2d at 565.

192. 714 F.2d 992, 995 (9th Cir. 1983); *accord Hernandez-Ortiz*, 777 F.2d at 509. On a motion to reopen, an applicant is only required to submit his own affidavit. Additional documentary evidence on a motion to reopen, however, can strengthen the application as it did in *Hernandez-Ortiz*.

193. 770 F.2d 786, 790 (9th Cir. 1985).

194. *Andres-Hernandez v. INS*, No. 83-7788, slip op. at 2 (9th Cir. Sept. 12, 1985).

195. *Id.* Cf. *Rojas-Alvarez v. INS*, No. 83-7972, slip op. at 2 (9th Cir. Nov. 7, 1985) (denial of continuance to obtain evidence of general conditions of upheaval in El Salvador not violation of due process since the "nature of the evidence . . . is not of the sort which could make a material difference in the outcome of the case").

in the applicant's home country. This type of evidence, without more, will not be sufficient to satisfy the applicant's burden of proof under either section 208 or section 243(h) provisions.¹⁹⁶ General documentary evidence, however, can have a fundamental impact on satisfaction of the requirement of objective evidentiary support under either section 243(h) or section 208, when such evidence is submitted in conjunction with a credible, detailed statement of the applicant, or other forms of documentation relating to the particular applicant.¹⁹⁷

Other Nontestimonial Evidence

The court has recognized that "applicants will rarely have documentary evidence that names them specifically as a target of government persecution."¹⁹⁸ As a result, the court has carefully considered other forms of evidence available to asylum seekers.

In *Zavala-Bonilla v. INS*, the applicant submitted four letters from friends and a fifth from her union in El Salvador.¹⁹⁹ The BIA disregarded the letters not only for their lack of translation certification but also as "gratuitous speculations."²⁰⁰ The court sharply disagreed with the BIA not only because it found no evidence that the letters were false, but also because "it is difficult to imagine, given her circumstances, what other forms of testimony Zavala-Bonilla could readily present."²⁰¹ The court also noted with sympathy that the letter writers were putting themselves at risk by writing, and their fear of future reprisals in El Salvador might influence their ability to write with more specificity or greater detail.²⁰²

Similarly, in *McMullen v. INS*, the court was critical of the Board's rejection of letters from the applicant's family that verified threats to the petitioner's life before his arrival in the United States.²⁰³ The court ruled there was no evidence that the letters were

196. See, e.g., *Lopez-Calderon v. INS*, No. 84-7362, slip op. at 7 (9th Cir. Nov. 13, 1985); *Palacios-Castro v. INS*, No. 83-7275, slip op. at 2 (9th Cir. Oct. 1, 1984).

197. See, e.g., *Del Valle v. INS*, 776 F.2d 1407, 1410, 1413 (9th Cir. 1985); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1288 (9th Cir. 1985); *Zavala-Bonilla v. INS*, 730 F.2d 562, 564 (9th Cir. 1984); *McMullen v. INS*, 568 F.2d 1312, 1317-18 (9th Cir. 1981).

198. *Castro-Magana v. INS*, No. 83-7378, slip op. at 6 (9th Cir. Sept. 25, 1984). See *supra* note 78.

199. 730 F.2d 562, 565 (9th Cir. 1984).

200. *Id.*

201. *Id.*

202. *Id.*

203. 658 F.2d 1312, 1319 (9th Cir. 1981).

false. Further, the court stated that “it is difficult to imagine what other forms of testimony the petitioner could present other than his own statement and those of family members since his potential persecutors are unlikely to make their intentions public.”²⁰⁴

In *Sarvia-Quintanilla v. INS*, however, the court rejected affidavits from close relatives because they failed to provide corroboration for the specific threats that the petitioner alleged were made against him.²⁰⁵ An affidavit from a lawyer in El Salvador stating that the petitioner risked assassination if he returned was also rejected because the lawyer did not explain the basis of his conclusion and was unfamiliar with the petitioner.²⁰⁶ In that case, however, the petitioner’s testimony was found lacking in credibility and could not be overcome by the “moving” but nonspecific affidavits.²⁰⁷

In *Chatila*, letters from members of petitioner’s political party were rejected when they did not state the basis for their contention that the petitioner would be arrested if returned to Venezuela.²⁰⁸ They were also rejected for their failure to corroborate persecution of party members, except for the mention of one incident in only the vaguest terms.²⁰⁹

Summary

The court’s decisions indicate a readiness to accept and utilize other forms of evidence when it corroborates a particular aspect of the petitioner’s case or provides specificity or details regarding facts relating to the petitioner’s claim for asylum or withholding of deportation.

Department of State Advisory Opinion Letter

Current regulations governing section 208 and section 243(h) proceedings require the Department of State Bureau of Human Rights and Humanitarian Affairs (BHRHA) to issue an advisory opinion concerning the applicant’s asylum or withholding of deportation request before the district director or the immigration judge can render a decision on the merits of the case.²¹⁰

204. *Id.*

205. 767 F.2d 1387, 1392 (9th Cir. 1985) (the letters also did not indicate that the group petitioner feared was continuing to look for him).

206. *Id.* at 1392-93.

207. *Id.* at 1392, 1394.

208. 770 F.2d 786, 790 (9th Cir. 1985).

209. *Id.* Cf. *Castillo-Diaz v. INS*, No. 83-7911, slip op. at 4 (9th Cir. Dec. 21, 1984) (newspaper clipping allegedly describing the murder of petitioner’s brother not probative where the clipping had no date, the names of the petitioner and of the victim were different, and there was no indication or extrinsic evidence that the petitioner and the person named in the newspaper clipping were related).

210. 8 C.F.R. §§ 208.7, 208.10(b) (1985). The State Department had a similar

The admissibility and reliability of the State Department advisory opinion letters were the subject of considerable discussion in the Ninth Circuit prior to the Refugee Act. For example, in *Asghari v. INS*, the court stated that the advisory letter from the State Department was from a "knowledgeable and competent source" and, therefore, was admissible at the hearing.²¹¹ But in *Kasravi v. INS*, the court called the State Department letter "perfunctory" and termed it "highly questionable" regarding matters relating to evaluating claims to protection from persecution. The court noted:

[The advisory opinion] letters from the State Department do not carry the guarantees of reliability which the law demands on admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations throughout the world. The traditional foundation required of expert testimony is lacking; nor can official position be said to supply an acceptable substitute. No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.²¹²

In another case relying on *Kasravi*, the court stated it "might well have been improper [for] the Board [to give] substantial weight to [the] generalities [in the State Department letter] without corroboration or further inquiry."²¹³ Since the Board did not base its conclusions on the letter, however, any error was not relevant to the outcome of the petitioner's case.²¹⁴

Since passage of the Refugee Act, there has been surprisingly little commentary by the court about BHRHA letters. In *Zavala-Bonilla v. INS*, the State Department advisory opinion stated that "if [the petitioner's] contentions were true, she had a well-founded fear of persecution."²¹⁵ But the Board had disregarded the letter because it ruled that the petitioner's testimony was not credible. The court reversed the Board's credibility determination, and consequently found that the BHRHA opinion should not have been discounted.²¹⁶ In addition, the court emphasized that the State Department's favorable advisory opinion was "especially significant" given the political constraints noted by the *Kasravi* court and "this country's economic and political ties to El Salvador, the applicant's home

consultative role under preceding regulatory schemes. See 8 C.F.R. § 108.2 (1975), promulgated at 39 Fed. Reg. 41,832 (1974).

211. 396 F.2d 391, 392 (9th Cir. 1968).

212. 400 F.2d 675, 676-77 n.1 (9th Cir. 1968).

213. *Hosseinmardi v. INS*, 405 F.2d 26, 28 (9th Cir. 1968).

214. *Id.* at 28; accord *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977).

215. 730 F.2d 562, 566 (9th Cir. 1984).

216. *Id.* at 566, 567 n.5.

country.”²¹⁷

In *Chatila*, the BHRHA letter indicated “that Venezuela [the petitioner’s home country] has an ‘excellent record’ in the observance of human rights and that the political opposition operates freely and openly.”²¹⁸ The court noted, without criticism, that “the immigration judge was clearly influenced” by the BHRHA letter in his determination denying section 208 and section 243(h) relief, a decision upheld by the BIA and the court.²¹⁹

Summary

Since passage of the Refugee Act, the Ninth Circuit has endorsed deference to the BHRHA advisory opinion only in limited circumstances. First, the BHRHA opinion letter is considered influential evidence where the country of nationality of the applicant has a good record on human rights and there are few asylum seekers from that country. Second, the BHRHA opinion is considered significant evidence where the country of nationality of the applicant has economic or political ties to the United States, and there are few recommendations to grant asylum to refugees from that country. The court, however, has not yet confronted the most common scenario involving BHRHA letters, that is, where the BHRHA recommends *against* granting asylum to an applicant who is from a country that is a beneficiary of economic or military aid from the United States.²²⁰ It is in such a situation that the court will test the continuing applicability of the views it expressed in *Kasravi*.

Applicant’s Testimony

Corroboration Requirement

Where the applicant’s own statement is the principal evidentiary support for his or her application for withholding of deportation or asylum, the Ninth Circuit has consistently characterized the request as lacking in factual support or constituting an undocumented claim.²²¹ Rulings by the court have emphasized that the assertion of

217. *Id.* at 567 n.6.

218. 770 F.2d 786, 790 (9th Cir. 1985).

219. *Id.*

220. See, e.g., *Hotel & Restaurant Employees Union v. Smith*, 594 F. Supp. 502, 510-14 (D.D.C. 1984); Georgetown Univ. Inst. for Pub. Representation, *The State Department Advisory Opinion: A Due Process Critique*, IMMIGRATION L. REP. 13 (1984); Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978).

221. See, e.g., *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984) (no “specific evidence” presented); *Shoae v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983) (“no concrete evidence”); *Moghianian v. United States Dept. of Just.*, 577 F.2d 141, 142 (9th Cir. 1978) (“undocumented claims”); *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) (no factual support). The unpublished decisions abound with similar rulings. See,

fear, without corroboration, is insufficient to satisfy the applicant's evidentiary burden.²²²

In *Bolanos-Hernandez*, the court for the first time created an exception to the universality of a corroboration requirement in section 208 and section 243(h) cases.²²³ Where the applicant's testimony is credible and alleges specific threats, the court eliminated the requirement for independent corroborative evidence of the specific threat. "If the alien's own testimony about a threat, when unrefuted and credible, was insufficient to establish the fact that the threat was made, it would be close to impossible for [any political refugee] to make a § 243(h) case."²²⁴ Although the court acknowledged the possibility that omitting a corroboration requirement might invite false claims for protection, the court felt compelled to protect the genuine refugee who "rarely [is] able to offer direct corroboration of threats."²²⁵

Two other panels of the Ninth Circuit have referred specifically to this aspect of the *Bolanos-Hernandez* holding and have clarified the scope of the corroboration rule.²²⁶ In *Sarvia-Quintanilla v. INS*²²⁷

e.g., *Rosales-Perez v. INS*, No. 83-7278, slip op. at 2 (9th Cir. Oct. 8, 1985) (applicant submitted no "independent corroborative evidence of his claim"); *Rad v. INS*, No. 83-7832, slip op. at 2 (9th Cir. Mar. 25, 1985) (none of the events described in the applicant's motion to reopen were "corroborated by independent evidence"); *Menjivar v. INS*, No. 82-7677, slip op. at 2 (9th Cir. July 15, 1983) ("conclusory statements of danger without documentary support" and "no objective correlation"); *Hafeez v. INS*, No. 81-7453, slip op. at 2 (9th Cir. Jan. 21, 1982) ("no concrete and believable evidence of persecution"). The Sixth Circuit consistently has rejected an applicant's statement as "self-serving." *Dally v. INS*, 744 F.2d 1191, 1196 (6th Cir. 1984); *Nasser v. INS*, 744 F.2d 542, 544 (6th Cir. 1984); see also *McMullen v. INS*, 658 F.2d 1312, 1318 (9th Cir. 1981) (INS argued that a petitioner in a deportation hearing is motivated to lie in support of his case).

222. See, e.g., *Sorto-Castro v. INS*, No. 83-7690, slip op. at 3 (9th Cir. Sept. 4, 1985) ("mere assertions of possible fear' . . . legally insufficient"); *Sangabi v. INS*, No. 83-7895, slip op. at 4 (9th Cir. Mar. 28, 1985) ("general allegation of potential persecution . . . [is] insufficient"); *Guerra-Magana v. INS*, No. 82-7044, slip op. at 2 (9th Cir. Nov. 19, 1982) ("undocumented assertions of belief"). But cf. *supra* text accompanying note 78.

223. 767 F.2d 1277, 1285 (9th Cir. 1985) (citation omitted); accord *Medrano-Martinez v. INS*, No. 84-7206, slip op. at 2-3 (9th Cir. Nov. 5, 1985).

224. 767 F.2d at 1285. Cf. *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) ("the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible, persuasive and points to specific facts that give rise to an inference that the applicant has been or has good reason to fear persecution").

225. *Bolanos-Hernandez*, 767 F.2d at 1285.

226. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1391 (9th Cir. 1985); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 n.3 (9th Cir. 1985).

227. 767 F.2d at 1391.

and *Saballo-Cortez v. INS*,²²⁸ the court ruled that the *Bolanos-Hernandez* holding applies where no question has been raised concerning the petitioner's credibility, no doubt has been expressed by the immigration judge or the Board that the threat was actually made, and general documentary evidence has been offered indicating that the threats should be considered serious ones.²²⁹

Summary

Despite the narrow gloss of recent decisions interpreting *Bolanos-Hernandez*, the ruling remains a landmark regarding an aspect of proof crucial to both asylum and withholding of deportation cases. The court clearly is aware of the fact that many asylum-seekers flee from countries where other citizens also are experiencing threats to their lives and freedom. Nevertheless, the court strongly stated that a petitioner's allegation of a specific threat cannot be deemed insufficient for the granting of withholding of deportation simply because it reflects a general level of violence.²³⁰ By creating an exception to the corroboration requirement where a specific threat is alleged, the *Bolanos-Hernandez* decision demonstrates the Ninth Circuit's willingness to accept lesser requirements of proof where to do otherwise would erect "insuperable barriers" to the protection of genuine refugees.²³¹

Credibility

Review of the immigration judge's evaluation of the credibility of the applicant is an extremely crucial element in the decisionmaking process at the appellate level.²³² The Ninth Circuit ruling in *Bolanos-Hernandez* further underscores the importance of the applicant's

228. 761 F.2d at 1264 n.3.

229. *Id.* Cf. *Del Valle v. INS*, 776 F.2d 1407, 1412 n.3 (9th Cir. 1985) (applicant's statement corroborated by testimony of relatives, letters from home and newspaper clippings regarding murder and disappearance of relatives); *Canjura-Flores v. INS*, No. 83-7890, slip op. at 6 (9th Cir. Sept. 24, 1985) (applicant's testimony supported by an Amnesty International Report; the court accepted the applicant's testimony as credible despite innuendoes in BIA decision that he was not believable).

230. *Bolanos-Hernandez*, 767 F.2d at 1285 ("[i]t should be obvious that the significance of a specific threat to an individual's life or freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything, as we posit it *infra*, that fact may make the threat more serious and credible").

231. *Id.* Where, however, the INS presents no evidence to contradict the applicant's statement, no rule compels the granting of asylum to the applicant. *Saballo-Cortez v. INS*, 761 F.2d 1259, 1265 (9th Cir. 1985) (petitioner argued that language in *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981) warranted such a rule); *Shah v. INS*, No. 82-7341 (9th Cir. Sept. 10, 1984) (INS failure to offer its own evidence may contribute to court's determination that substantial evidence for the decision below is lacking); *Gabriel-Velasquez v. INS*, No. 83-7952 (9th Cir. Sept. 4, 1984).

232. See, e.g., *Zavala-Bonilla v. INS*, 730 F.2d 562, 566 (9th Cir. 1984).

credibility to the outcome of an asylum or withholding of deportation case.²³³

The Ninth Circuit will not overturn the BIA's credibility ruling if it was substantially supported by the evidence in the record.²³⁴ In a recent decision, the court held that "[b]ecause the immigration judge is in the best position to evaluate an alien's testimony, his or her credibility determinations are to be given 'much weight.'"²³⁵ Further, although the court may conduct an *independent review* of the entire record to determine if the credibility ruling is substantially supported by the evidence, it will not render an *independent finding* of credibility.²³⁶

The following examples from Ninth Circuit cases illustrate the factors consistently cited by the court as key to its review of credibility determinations.

Inconsistencies

In *Saballo-Cortez v. INS*, discrepancies between the applicant's original sworn asylum request form and his testimony at hearing were critical to the court's upholding of the adverse credibility deter-

233. See *supra* text accompanying notes 223-25.

234. *Saballo-Cortez v. INS*, 761 F.2d 1259, 1262 (9th Cir. 1985); accord *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985). Cf. *Espinosa-Ojeda v. INS*, 449 F.2d 183, 186-87 (9th Cir. 1969) (if the credibility evaluation rests on reasonable, substantial and probative evidence, it must be upheld). *Contra Ayala v. INS*, No. 83-7610, slip op. at 2 (9th Cir. Sept. 24, 1984) (applying abuse of discretion review to immigration judge's credibility determination).

235. *Estrada v. INS*, 775 F.2d 1019 (9th Cir. 1985) (citing *Phinpathya v. INS*, 673 F.2d 1013, 1019 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984)); *Espinosa-Ojeda v. INS*, 419 F.2d 183, 186 (9th Cir. 1969); accord *Solano-Martinez v. INS*, No. 83-7320, slip op. at 2 (9th Cir. Aug. 29, 1985) (deference must be given to immigration judge's findings on credibility); *Otabachian v. INS*, No. 82-7416, slip op. at 2 (9th Cir. June 30, 1983) (where the immigration judge has made credibility findings, they "carry great weight and ordinarily will not be set aside"); *Ayala v. INS*, No. 83-7610, slip op. at 2 (9th Cir. Sept. 24, 1984) (demeanor best seen and evaluated by the immigration judge). Cf. *Callejas-Morales v. INS*, No. 83-7172 (9th Cir. Oct. 31, 1985) (objection to immigration judge's adverse credibility ruling may not be considered on appeal to Ninth Circuit if not raised in BIA appeal).

236. Compare *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) with *McMullen v. INS*, 658 F.2d 1312, 1318 (9th Cir. 1981) (it is particularly appropriate for the court to consider the immigration judge's findings when the immigration judge and the BIA differ on the credibility determination). Cf. *Medrano-Martinez v. INS*, No. 84-7206, slip op. at 3 (9th Cir. Nov. 15, 1985) (case remanded for Board to make its own credibility determination when it does not accept immigration judge's findings); *Canjura-Flores v. INS*, No. 83-7890, slip op. at 5 (9th Cir. Sept. 24, 1985) (where neither the immigration judge nor the BIA specifically ruled that the applicant's testimony was not credible, the court can accept the applicant's testimony as credible).

mination by the immigration judge and the Board.²³⁷ The court devoted several pages of its decision to a recitation of the facts as stated in the original application and in the applicant's testimony at his deportation hearing. The court then focused on inconsistencies in the applicant's statements regarding such primary issues as his ability to work and to have access to food in his native Nicaragua and his ability to depart his homeland.²³⁸ Further, in *Castillo-Diaz v. INS*, an unpublished Ninth Circuit decision, the court ruled that widespread discrepancies between the asylum application and the applicant's testimony, even as to secondary issues, undermined the applicant's credibility.²³⁹

Contradictory statements made by the applicant during his deportation hearing were also found to undermine his reliability in the *Saballo-Cortez* case. For example, the applicant alleged fear of persecution because of his failure to serve in the military in his country. But the court emphasized that the applicant also stated that he had never been arrested in Nicaragua for his military resistance, and that he was allowed to travel outside his country on a national passport.²⁴⁰ In another example, *Gabriel-Velasquez v. INS*, the court upheld an adverse credibility ruling by the immigration judge where the petitioner admitted that he had not read a newspaper account of the killings of twelve Guatemalan Indians from his same tribe, as he had previously stated, but had been told about the incident by someone who read the account to him. Petitioner also gave three different dates for his arrival in the United States.²⁴¹

In *Canjura-Flores v. INS*, the court took issue with the Board's emphasis on the one inconsistency in the applicant's testimony.²⁴² There, the petitioner testified that the National Guard was given the names of members of the Popular League, the leftist group of which he was a member and that the National Guard sought him out by

237. *Saballo-Cortez*, 761 F.2d at 1263-64.

238. *Id.* In *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984), the court closely examined each discrepancy cited by the BIA in its conclusion that the applicant was not credible. The court found that the applicant's testimony about an attack on a group of striking workers and her own mistreatment by the state police at her hearing in fact was consistent with her statements in her asylum application. Further, her testimony about open participation in political activities such as distributing leaflets and picketing was not inconsistent with her stated fear of police surveillance that required her to hide herself to preserve her own safety. Finally, her statement on her asylum application that her children lived under false names in El Salvador was not contradicted by her testimony that they used the name Zavala when writing to her but did not use her name publicly. The court found these discrepancies insufficient to undermine credibility and reversed the BIA.

239. *Castillo-Diaz v. INS*, No. 83-7911, slip op. at 3 (9th Cir. Nov. 15, 1984).

240. *Saballo-Cortez*, 761 F.2d at 1264. Cf. *Lopez-Calderon v. INS*, No. 84-7362, slip op. at 4 (9th Cir. Nov. 13, 1985).

241. No. 83-7952, slip op. at 2 (9th Cir. Sept. 4, 1984).

242. No. 83-7890, slip op. at 7 (9th Cir. Sept. 24, 1985).

his nickname at his family home. He also stated that he was unsure if there was a written list with the names of the members of the Popular League. The court ruled that any inconsistency in testimony regarding the receipt by the National Guard of a written list of names as opposed to oral statements of the names was irrelevant to the determination of the petitioner's case.²⁴³

The BIA cannot, however, draw improper inferences and render legal conclusions inconsistent with the applicant's statement if it is accepted as credible.²⁴⁴ For example, in *Del Valle v. INS*, the applicant testified that he had been accused of participating in a guerrilla group, arrested, beaten, and then released by security forces in his native El Salvador.²⁴⁵ The BIA concluded that his release resulted because the security forces were satisfied that he was not a member of the guerrilla group.²⁴⁶ The court ruled this was clearly inconsistent with the credible testimony of the applicant that he believed that his release was solely a result of the security forces' attempt to absolve themselves of the responsibility for his disappearance but that he did not know the exact reason for his release.²⁴⁷ The court ruled that the BIA's conclusion had no evidentiary support and could not be inferred solely from the fact of release.²⁴⁸

Vagueness

In *Solano-Martinez v. INS*, the court specifically mentioned the applicant's inability to remember his date of arrival in the United States, his date of departure from El Salvador, and the date as well as other important details of an alleged act of harassment by the guerrillas as relevant to an assessment of the truthfulness of his fear of persecution.²⁴⁹ In *Estrada v. INS*, the court upheld an adverse credibility determination where the petitioner's allegations regarding

243. *Id.*

244. *Del Valle v. INS*, 776 F.2d 1407, 1412-13 (9th Cir. 1985). *Cf.* *Garcia-Ramos v. INS*, 775 F.2d 1370 (9th Cir. 1985).

245. 776 F.2d at 1409-10. His testimony was corroborated by the testimony of a relative and letters from home. *Id.* at 1407 n.3.

246. *Id.* at 1413.

247. *Id.* at 1412.

248. *Id.* at 1413. The court added: "This would lead to the absurd result of denying asylum to those who actually experienced persecution and were fortunate enough to survive arrest or detention." *Id.*

249. *Solano-Martinez v. INS*, No. 83-7320, slip op. at 2-3 (9th Cir. Aug. 29, 1985). *Cf.* *McMullen*, 658 F.2d at 1318 (in commenting on McMullen's detailed, specific testimony, the court noted that he "is either a skilled liar or . . . he [is] telling the truth;" the court concluded that he was credible).

threats against him were vague.²⁵⁰ For example, the petitioner failed to detail the number of threats and he failed to explain their substance. He also was unclear about the identity of the "private groups" he allegedly feared would persecute him.²⁵¹ Several other Ninth Circuit unpublished decisions emphasize the petitioner's vagueness, evasiveness, and nonresponsive answers as raising serious concerns regarding the truthfulness of his statements.²⁵²

Admissions of Dishonesty

In *Sarvia-Quintanilla v. INS*, the applicant admitted that he lied to obtain an American passport, that he had traveled to the United States under an assumed name, and that he lied to United States immigration officials to avoid deportation to El Salvador.²⁵³ The court concluded that the petitioner's "admitted history of dishonesty" justified the immigration judge's determination which accorded little weight to his testimony.²⁵⁴

In *Canjura-Flores v. INS*,²⁵⁵ the petitioner admitted giving a false name to police and to the immigration judge at a previous deportation hearing. The court did not deem it necessary to consider these factors in reaching their determination that the applicant otherwise had substantiated his claim to withholding of deportation and his eligibility as a refugee under the asylum provision.²⁵⁶

Other Negative Factors

Evidence that the applicant's family members remain safely in the home country²⁵⁷ or that the applicant was never harassed personally before his departure from his country²⁵⁸ are commonly cited by the

250. 775 F.2d 1019, 1021 (9th Cir. 1985).

251. *Id.*

252. See, e.g., *Nunez-Alfaro v. INS*, No. 83-7208, slip op. at 2 (9th Cir. Sept. 17, 1985); *Mendez-Gonzalez v. INS*, No. 83-7187, slip op. at 2 (9th Cir. Sept. 12, 1985); *Ayala v. INS*, No. 83-7610, slip op. at 2 (9th Cir. Sept. 24, 1984).

253. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1393 (9th Cir. 1985).

254. *Id.*; accord *Castillo-Diaz v. INS*, No. 83-7911 (9th Cir. Dec. 21, 1984); *Ayala v. INS*, No. 83-7610, slip op. at 2 (9th Cir. Sept. 24, 1984).

255. No. 83-7890 (9th Cir. Sept. 24, 1985).

256. *Id.*

257. See, e.g., *Estrada v. INS*, 775 F.2d 1019, 1021 (9th Cir. 1985); *Figueroa-Polio v. INS*, No. 84-7240, slip op. at 3 (9th Cir. Aug. 30, 1985); *Solano-Martinez*, No. 83-7320, slip op. at 3; *Rivera v. INS*, No. 83-7847, slip op. at 2 (9th Cir. May 6, 1985); *Lopez-Canas v. INS*, No. 83-7849, slip op. at 3 (9th Cir. Dec. 5, 1984); *Lopez-Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *Menjivar v. INS*, No. 82-7677, slip op. at 2 (9th Cir. July 15, 1983); *Otabachian v. INS*, No. 82-7416, slip op. at 2 (9th Cir. June 30, 1983). Cf. *McMullen*, 658 F.2d at 1319 ("the fact that McMullen's family is safe does not refute McMullen's claims" given the particular facts of the case).

258. *Solano-Martinez*, No. 83-7320, slip op. at 3 (resumed work on family farm after alleged threat from guerrillas and remained for two months before leaving the country); *Ramirez v. INS*, No. 84-7500, slip op. at 3 (9th Cir. Aug. 20, 1985) (left El Salvador after shooting incident but returned for several months and experienced no

Ninth Circuit as evidence contradicting the applicant's stated need for asylum or withholding of deportation protection. In one recent case, however, the court stated that evidence of harassment or harm to the applicant or his family, while substantially contributing to an applicant's burden of proof, is not *essential* to an asylum claim.²⁵⁹

Evidence that the applicant successfully obtained a passport or other travel document from his government is often cited as an indication that the government would not persecute the applicant.²⁶⁰ But where an applicant obtains his passport by a bribe to a government official, the court has stated in a recent case that "his ability to obtain a passport may have little or no relevance to his claim of possible persecution."²⁶¹ The court additionally commented that they doubted whether evidence of a passport "should be entitled to much weight in any asylum case."²⁶²

Summary

The credibility of the applicant for asylum and withholding of deportation is one of the most significant factors in the ultimate outcome of the applicant's case. The Ninth Circuit will uphold adverse credibility findings by the immigration judge or the BIA, where the applicant's statements are riddled with inconsistencies, where the statements are vague and nonspecific, where the applicant admits dishonesty, or where there is a congruence of these factors with other evidence contradictory of the applicant's alleged fear of persecution.²⁶³

problems); *Balladares v. INS*, No. 84-7340, slip op. at 4 (9th Cir. Aug. 9, 1985) (lengthy period of residence in Nicaragua after revolution without evidence of persecution); *Gabriel-Velasquez v. INS*, No. 83-7340, slip op. at 3 (9th Cir. Sept. 14, 1984) (no evidence of any form of prior persecution in Guatemala).

259. *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985).

260. *Estrada v. INS*, 775 F.2d 1019, 1021 (9th Cir. 1985) (granted exit permit to leave Guatemala); *Sarvia-Quintanilla*, 767 F.2d at 1394 (no difficulty obtaining Salvadoran passport); *Balladares*, No. 84-7340, slip op. at 4 (exit visas obtained before departure); *Saballo-Cortez v. INS*, 761 F.2d 1259, 1264 (9th Cir. 1985) (allowed to travel outside his country on a Nicaraguan passport); *Espinosa-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985) (acquired Nicaraguan passport without difficulty); *Palacios-Castro v. INS*, No. 83-7275, slip op. at 2 (9th Cir. Oct. 1, 1984) (granted a visa to leave El Salvador).

261. *Garcia-Ramos*, 775 F.2d at 1374.

262. *Id.* n.7, citing with approval HANDBOOK, *supra* note 63, ¶ 48.

263. Even absent an explicit adverse credibility finding, the presence of several negative factors has warranted the affirmance of the denial of an asylum or withholding of deportation application. See, e.g., *Figueroa-Polio*, No. 84-7240, slip op. at 3-5; *Rivera v. INS*, No. 84-7500, slip op. at 3 (9th Cir. Aug. 20, 1985); *Balladares*, No. 84-7340, slip op. at 4.

The court will reverse a negative credibility determination where the factors discussed above are not present, where inconsistencies in the record can be explained or are insignificant, or where the applicant presents sufficient evidence of the reasonableness of his or her fear of future persecution to overcome any questions regarding believability.²⁶⁴

CONCLUSION

The Ninth Circuit decisions have contributed significantly to the interpretation of the Refugee Act of 1980 in several key areas. Most noteworthy among the court's decisions are the following: the "well-founded fear" standard of proof applies to asylum applications;²⁶⁵ the well-founded fear standard encompasses objective (the fear is objectively reasonable) and subjective (the fear is genuine) elements and is concerned with the *possibility* of persecution;²⁶⁶ the clear probability standard for withholding of deportation is concerned with the *probability* of persecution but can be satisfied by general documentary evidence about oppressive conditions coupled with specific testimony;²⁶⁷ an applicant's credible, specific, but uncorroborated testimony regarding direct threats is sufficient to establish his burden of proof under either standard;²⁶⁸ groups beyond government control can be potential sources of persecution;²⁶⁹ political neutrality can be a manifestation of political opinion;²⁷⁰ and the perceptions of the government or other persecuting agent is the key factor in determining whether persecution on the basis of political opinion is likely.²⁷¹

Each declaration of precedent opens the door to new questions of interpretation which will eventually require resolution by the court. For example, the Ninth Circuit has characterized the requirements of proof for asylum or withholding of deportation to include a statement by the alien of his own *particular* fear that if persecution occurs he, and not someone else, will be the target of the act of perse-

264. *Canjura-Flores v. INS*, No. 83-7890, slip op. at 6 (9th Cir. Sept. 24, 1985); *Argueta v. INS*, 759 F.2d 1395, 1397 (9th Cir. 1985); *Zavala-Bonilla v. INS*, 730 F.2d 562, 566 (9th Cir. 1984); *McMullen*, 658 F.2d at 1318. Cf. *Garcia-Ramos*, 775 F.2d at 1370.

265. *Cardoza-Fonseca v. INS*, 767 F.2d 1448 (9th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3561, No. 85-782 (U.S. Feb. 23, 1986). See *supra* text accompanying notes 57-73.

266. *Id.* See *supra* text accompanying notes 74-77.

267. *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1985). See *supra* text accompanying notes 66-68.

268. *Id.* See *supra* text accompanying notes 223-29.

269. *McMullen*, 658 F.2d at 1315. See *supra* text accompanying notes 123-24.

270. *Bolanos-Hernandez*, 749 F.2d at 1316 (9th Cir. 1984), *as amended*, 767 F.2d 1277 (9th Cir. 1985). See *supra* text accompanying notes 149-61.

271. *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). See *supra* text accompanying notes 162-66.

cution. The applicant then must corroborate or substantiate that fear by his own *specific* and *detailed* testimony or extrinsic evidence.²⁷² These requirements are, without question, reasonable ones. But several recent decisions have added a new gloss to these requirements of proof for asylum and withholding of deportation applicants—the “singling out” requirement.²⁷³ In *Cardoza-Fonseca v. INS*, for example, the court stated:

If documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to specific facts that give rise to an inference that the applicant has been or has good reason to fear that he or she *will be singled out* for persecution on one of the specified grounds listed in section 208(a).²⁷⁴

The court has not yet clarified if the “singling out” language is simply another way of saying that the applicant must demonstrate the well-foundedness of his belief that he *personally* will be the victim of persecution, or if the “singling out” requirement is an additional and implicitly more burdensome requirement than that of specificity or particularity.

If the court adopts the latter view in future cases, it must recognize the limitations inherent in a “singling out” requirement. For example, the requirement renders an applicant dependent on his potential persecutor as the only possible source of evidence that the applicant “will be singled out for persecution” since only the persecutor *knows* that an individual has been or will be designated as a target of persecution. But this seems contradictory to the court's view that persecutors do not provide such information.²⁷⁵ Thus, the effect of the “singling out” requirement is to restrict the accessibility of asylum and withholding of deportation protection to those persons who have already experienced persecution or direct threats of persecution because they would be the only refugees able to verify a persecutor's intentions to individually target them. The applicant who

272. See, e.g., *Cardoza-Fonseca*, 767 F.2d at 1453; *Espinosa-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985); see also *Bolanos-Hernandez*, 767 F.2d at 1277.

273. *Nunez-Alfaro v. INS*, No. 83-7208, slip op. at 3 (9th Cir. Sept. 17, 1985); *Andres-Hernandez v. INS*, No. 83-7788, slip op. at 2 (9th Cir. Sept. 12, 1985); *Figueroa-Polio v. INS*, No. 84-7240, slip op. at 3 (9th Cir. Aug. 30 1985); *Sanchez-Reyes v. INS*, No. 83-7977, slip op. at 2 (9th Cir. Jan. 1, 1985); *Turcios v. INS*, No. 83-7802, slip op. at 2 (9th Cir. Sept. 4, 1984). Cf. *Espinosa-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985) (must demonstrate that persecution would be directed against applicant as an individual); *Ballard v. INS*, No. 84-7340, slip op. at 3 (9th Cir. Aug. 9, 1985); *Castillo-Diaz v. INS*, No. 83-7911, slip op. at 3 (9th Cir. Dec. 21, 1984).

274. 767 F.2d at 1453 (citing *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (5th Cir. 1985)) (emphasis added).

275. See *supra* note 78.

experienced a direct threat of persecution and then fled his country, or who obtained specific information that his persecutors continue to search for him, would be one of the few refugees who could satisfy the additional burden of the "singling out" requirement.

Many other refugees do possess good reason to fear persecution, even though they have had the good fortune not to experience persecution or direct threats of harm. In fact, many refugees would never have been able to escape from their countries had they already been the victims of persecution. As a result, the courts consistently have described the burden of proof to establish a claim for refugee protection as requiring that a refugee must demonstrate that he *either* has been a victim of persecution *or* has a well-founded fear or clear probability of future persecution.²⁷⁶

These refugees document their requests for protection by recounting their own particular experiences before flight from their homeland, and by presenting documentary and testimonial evidence regarding the experiences of others like themselves and regarding human rights violations in their home countries. For refugees such as these, the court's decision regarding the permanent incorporation of the "singling out" language as an added requirement of proof will be crucial to their ability to substantiate requests for asylum and withholding of deportation.

In addition, the "singling out" requirement is particularly onerous for those applying for asylum or withholding of deportation on one of the group bases. The fact that others have experienced or will experience persecution for the same reasons as the applicant is at the core of an applicant's fear of future persecution on a group membership basis. By definition, the applicant will be unable to demonstrate that he individually will be "singled out" for harm as opposed to any other member of his racial, social, religious or national group.²⁷⁷

Further, while the Ninth Circuit willingly has acknowledged the difficulties of proof inherent in all asylum and withholding of deportation cases,²⁷⁸ the court has only eliminated the requirement of corroboration of specific facts in the asylum or withholding application in situations where the applicant alleges a direct threat against himself personally.²⁷⁹

The primary rationale of the ruling—the unavailability of corroborative evidence for facts of this nature and the consequent impossi-

276. See, e.g., *Del Valle v. INS*, 776 F.2d 1407, 1411, 1413 (9th Cir. 1985); *Lopez v. INS*, 775 F.2d 1015, 1016 (9th Cir. 1985); *Cardoza-Fonseca*, 767 F.2d at 1453 (9th Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 573-74 (5th Cir. 1985) (citing *Kashani v. INS*, 547 F.2d 376 (7th Cir. 1977)).

277. Cf. *Bolanos-Hernandez*, 767 F.2d at 1277.

278. See *supra* note 78.

279. *Bolanos-Hernandez*, 767 F.2d at 1277. See *supra* text accompanying notes 211-15.

bility of satisfying the burden of proof—applies equally to many other facts typically alleged by asylum applicants. Asylum applicants commonly assert membership in clandestine organizations or legal organizations forced “underground” by the government; receipt of threats by phone or letter; assassinations, disappearances or harassment of friends, co-workers, fellow students, or family members; participation of family members in proscribed organizations; participation in leafletting, spray-painting, speech-making, or meeting attendance.²⁸⁰

In reality, potential sources of verification of facts such as these are as unavailable or as difficult to access as the clearly unavailable persecutor’s corroboration of his own direct threat. For example, family members, co-workers, or fellow students remaining in the homeland are unlikely to provide letters or affidavits to verify facts alleged by the applicant.²⁸¹ If they do, they may be acting at great risk.²⁸² Furthermore, refugees rarely bring corroborative documents with them when they flee. In addition, many refugees do not have family members or friends in the United States who are personally familiar with the circumstances of the refugee.

The court has expressed sensitivity to the difficulties of corroborating the types of facts common to asylum and withholding of deportation applications, and has applied that sensitivity on a case-by-case basis to the benefit of some genuine refugees wrongfully denied protection by the BIA.²⁸³ It is now time for the court to fashion workable evidentiary rules that account for the unavailability of documentation of specific facts on asylum and withholding of deportation. Clear evidentiary guidelines from the court would assist both adjudicators and advocates in guaranteeing bona fide refugees in the United States protection from persecution in another country.

280. See, e.g., *Del Valle*, 776 F.2d at 1407; *Garcia-Ramos*, 775 F.2d at 1370; *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

281. Asylum applicants are similarly reluctant even to request statements from family or friends since they do not want to jeopardize loved ones remaining at home.

282. *Zavala-Bonilla*, 730 F.2d at 565 (“[the letter writer’s] fear of reprisal may account for the letters’ lack of specificity”).

283. See, e.g., cases cited *supra* notes 264 & 265.

